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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, [redacted] 1918

No. [redacted] 158

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

FILED MARCH 24, 1917.

(25,853)

(25,853)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1917.

No. 453.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, APPELLANT,

vs.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., JUNE 29, 1917.

1 & 2

In the Court of Claims.

No. 30364.

THE DELAWARE, LACKAWANA AND WESTERN RAILROAD COMPANY

v.

THE UNITED STATES.

Amended and Consolidated Petition.

Dec. 31, 1915.

To the Honorables the Chief Justice and Judges of the Court of Claims:

Your petitioner, the Delaware, Lackawanna and Western Railroad Company, by leave of court first had and obtained, consolidating its original and supplemental petitions and amending the same, shows unto your honors the following facts:

I.

Petitioner is a corporation organized under the laws of the State of Pennsylvania. It operates and at the times hereinafter stated did operate a system of railways in the States of New York, New Jersey and Pennsylvania. Under contracts entered into by its President and the Second Assistant Postmaster-General, it, since July 1, 1905, has carried mails on divers routes established by the postal authorities on its lines of railway; one of said routes, numbered by the postal authorities 107,108, having Hoboken, in New Jersey, and Buffalo, in New York, as its termini, and another, numbered 109,013, having Hoboken and Denville, also in New Jersey, as its termini.

3

II.

The act of Congress approved June 8, 1872, entitled "An act to revise, consolidate, and amend the statutes relating to the Post Office Department," contained a section in the words below (17 Statutes at Large, 309):

"That the Postmaster-General shall arrange the railway routes on which the mail is carried, including those in which the service is partly by railway and partly by steamboat, into three classes, according to the size of the mails, the speed at which they are carried, and the frequency and importance of the service, so that each railway company shall receive, so far as practicable, a proportionate and just rate of compensation, according to the service performed."

By the next following section of said act rates to be paid to the three classes of railways, respectively, were named. By an act of Congress, approved March 3, 1873, the Postmaster-General was directed to ascertain the average daily weights of mails carried on all railroads, and new rates to be paid with respect to such weights were named. So much of said act as related to said two subjects is in the words below (Ib., p. 558):

"That the Postmaster-General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit: That the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails, and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of two hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars; five thousand pounds, two hundred dollars and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster-General may direct."

By an act of Congress approved July 12, 1876 (19 Statutes at Large, 78), the rates of pay with respect to weights of mail authorized by said act of March 3, 1873, were reduced 10 per centum; and by an act of July 17, 1878 (20 Statutes at Large, 140), a reduction of 5 per centum was made from the rates resulting from the act of July 12, 1876.

III.

The contract covering the transportation of mails on each of said routes was contained on a printed form known as a Distance Circular furnished petitioner by the Post Office Department, whereon the distance between the stations on each of said routes and the total length of the route was to be stated by petitioner, and which contained the following clause, known as the "agreement clause":

"In case the Post Office Department authorizes the transportation of mails over this line or any part of it, the railroad company agrees to accept and perform service upon the conditions prescribed by law and the regulations of the Department."

Each of said distance circulars was properly filled out and the agreement clause executed by petitioner and the circular

5 was returned to the Post Office Department on or about the first day of July, 1905, to go into effect on that day, on the termination of a similar agreement executed four years before.

Practically from the institution of mail service on railroad lines, and long prior to 1873, the country had been divided by the Postmaster-General into four sections, and the railway mail pay in each section was readjusted in rotation on each railroad route once in every four years.

Following the act of March 3, 1873 (17 Statutes at Large, 558) set forth in paragraph II, supra, by which the railway mail pay was directed to be calculated on the basis of so much per mile per annum according to the weight carried over the whole length of the route, and readjustments made not less frequently than once in every four years, it was the practice of the Post Office Department to obtain from the railroad companies the same information, regarding distances, as is now furnished on the Distance Circulars, and after the weighing of the mails had been completed and the compensation calculated, it was the practice to have the railroad companies sign a separate contract covering each route. These contracts covered a term of four years, or until the next weighing in the particular section concerned.

In the course of time, the number of railroad mail routes increased and were continuing to increase to such an extent that it became exceedingly onerous to draw a separate four-year contract for each route, and to handle the correspondence relating thereto. Thereupon the agreement clause on the Distance Circular, substantially as its appears above, was devised and each railroad company as the pay of its routes was readjusted, was tendered the Distance Circular with the agreement clause attached and was advised that this was intended to have the same effect as the formal four-year con-

6 tract previously signed. The railroad companies generally, including petitioner, executed said agreement clauses on the common understanding with the Post Office Department that they constituted four-year contracts for the transportation of the mails at the statutory rates in effect at the time of the execution, and that the pay would be stated in due course of business when the calculation of the same had been completed; and this has always been done. Petitioner is unable to state just when said agreement clause was first devised and adopted in lieu of the formal four-years contracts, but quadrennially, prior to 1905, it has executed such agreements on the understanding that they constituted four-year agreements, and it executed said agreement clause in 1905 with the same understanding.

In order to ascertain the compensation due to petitioner for the next following four-year period the Postmaster-General in the spring of 1905 caused the mails carried on said routes to be weighed for thirty (30) consecutive working days and thus determined the average weights of mail carried each day; and for the service rendered by petitioner under said contracts from July 1, 1905, to June 30, 1907, he allowed and caused to be paid the compensation due at the

rates of said act of July 17, 1878, on the weights of mail and distances so established.

IV.

An act of Congress approved March 2, 1907 (34 Statutes at Large, 1212), contained a paragraph in the words below:

"The Postmaster-General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mails per day of upward of five thousand pounds by making
7 the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds; and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

V.

The compensation, ascertained by the Postmaster-General in the fall of 1905, to be due petitioner on said routes, was paid to petitioner for its said service until July 1, 1907. But with respect to the service of the two years commencing July 1, 1907, the Postmaster-General, without causing or suggesting to petitioner any reweighing of the mails on said routes, proceeded to reduce, and did reduce, over petitioner's protest, petitioner's compensation by applying rates 5 per cent less than those which had been paid since July 1, 1905, on weights carried above 5,000 pounds per day as ascertained in 1905. The said deduction was made as to both of said routes; the average daily weight ascertained in 1905 on neither of them being as much as 48,000 pounds.

For the two years beginning July 1, 1907, and ending June 30, 1909, the amount so deducted and withheld from petitioner
8 is six thousand nine hundred and eighty-four dollars and ten cents ($6,984.10).

VI.

Petitioner alleges that for the transportation of the mails on each of said routes, it had a four-year contract terminating on June 30,

1909, for the compensation due at the rates in effect at the time the contract was entered into, effective on the 1st day of July, 1905, which compensation was stated to it in due course of business by the Postmaster-General in the fall of 1905, and that, therefore, the attempt of the Postmaster-General to reduce the compensation on July 1, 1907, was null and void. But petitioner says that if it did not have a four-year contract as alleged, the action of the Postmaster-General in merely reducing petitioner's compensation without reweighing the mails, and applying the reduced rates to the new weights thus ascertained was not an execution of the said act of March 2, 1907, and was wholly unwarranted and illegal.

Premises considered, petitioner prays judgment against the United States in the sum of six thousand nine hundred and eighty-four dollars and ten cents ($6,984.10), the aggregate of said unlawful deductions from its compensation; the same being still entirely unpaid and unassigned.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY,
By A. D. CHAMBERS, *Its Treasurer.*

STATE OF NEW YORK,
County of New York, ss:

Before me, Joseph Fiell, a Notary Public in and for said State and County, A. D. Chambers, whose name is signed to the
9 foregoing petition as Treasurer of the Delaware, Lackawanna and Western Railroad Company, made oath on this 30th day of December, 1915, that the allegations of said petition are true to the best of his knowledge, information and belief.

A. D. CHAMBERS.

Subscribed and sworn to before me on the day above written.

JOSEPH FIELL,
Notary Public, New York County.

BENJAMIN CARTER,
F. CARTER POPE,
Attorneys for Claimant.

10 II. *Traverse.*

11 III. *Argument and Submission of Case.*

On May 26, 1916, this case was argued by Messrs. Benjamin Carter, Philip M. Ashford and F. Carter Pope for the claimant, and Messrs. J. Robert Anderson, Joseph Stewart and Huston Thompson, for the defendants, and submitted.

12 IV. *Findings of Fact, Conclusion of Law, and Opinion by Campbell, Ch. J.*

Filed June 5, 1916.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY

v.

THE UNITED STATES.

This case having been heard by the Court of Claims the court, upon the evidence, makes the following

Findings of Fact.

I.

The claimant is a corporation organized under the laws of the State of Pennsylvania, and at the times hereinafter stated owned and operated and still owns and operates a system of railways in the States of New York, New Jersey, and Pennsylvania, over which railways it had for many years transported the mails of the United States under agreements, such as is hereinafter shown between the Post Office Department and the proper officers of the claimant over routes hereafter stated.

II.

By an act of Congress approved March 3, 1873, 17 Stats. 556, 558, entitled: "An Act Making Appropriations for the Service of the Post Office Department for the year ending June thirtieth, eighteen hundred and seventy-four," it was provided as follows:

"For increase of compensation for the transportation of mails on railroad routes upon the condition and at the rates hereinafter mentioned, five hundred thousand dollars, or so much thereof as may be necessary: Provided, that the Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to wit: That the mails shall be conveyed with due frequency and speed; that sufficient and suitable room, fixtures, and furniture, in a car or apartment properly lighted and warmed, shall be provided for route agents to accompany and distribute the mails; and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of

13 two hundred pounds, fifty dollars; five hundred pounds, seventy-five dollars; one thousand pounds, one hundred dollars; one thousand five hundred pounds, one hundred and twenty-five dollars; two thousand pounds, one hundred and fifty dollars; three thousand five hundred pounds, one hundred and seventy-five dollars;

five thousand pounds, two hundred dollars, and twenty-five dollars additional for every additional two thousand pounds, the average weight to be ascertained in every case by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct; Provided also, That in case any railroad company now furnishing railway post-office cars shall refuse to provide such cars such company shall not be entitled to any increase of compensation under any provisions of this act; Provided further, That additional pay may be allowed for every line comprising a daily trip each way of railway post-office cars, at a rate not exceeding twenty-five dollars per mile per annum for cars forty feet in length; and thirty dollars per mile per annum for forty-five feet cars; and forty dollars per mile per annum for fifty-feet cars; and fifty dollars per mile per annum for fifty-five to sixty feet cars: And provided also, That the length of cars required for such post-office railway-car service shall be determined by the Post Office Department, and all such cars shall be properly fitted up, furnished, warmed, and lighted for the accommodation of clerks to accompany and distribute the mails: And provided further, That so much of section two hundred and sixty-five of the act approved June eighth, eighteen hundred and seventy-two, entitled 'An act to revise, consolidate, and amend the statutes relating to the Post Office Department,' as provided that 'the Postmaster General may allow any railroad company with whom he may contract for the carrying of the United States mail, and who furnish railway post-office cars for the transportation of the mail, such additional compensation beyond that now allowed by law as he may think fit, not exceeding, however, fifty per centum of the said rates,' be, and the same is hereby, repealed."

The weighings in 1874 and 1875 under said act of March 3, 1873, required for the fixing of the compensation of the railroad companies for the fiscal years ending June 30, 1875, and June 30, 1876, were made by the railroad companies concerned. An act of Congress approved March 3, 1875, 18 Stats., 340, 341, entitled "An act making appropriations for the service of the Post Office Department for the fiscal year ending June thirtieth, eighteen hundred and seventy-six, and for other purposes," contained the following provisions:

"Out of the appropriation for inland mail transportation the Postmaster General is authorized hereafter to pay the expenses of taking the weights of the mails on railroad routes, as provided by the act entitled 'An act making appropriations for the service of the Post Office Department for the year ending June thirtieth, eighteen hundred and seventy-four,' approved March third, eighteen hundred and seventy-three; and he is hereby directed to have the mails weighed as often as now provided by law by the employees of the Post Office Department, and have the weights stated and verified to him
14 by said employees under such instructions as he may consider just to the Post Office Department and the railroad companies."

Since said acts were passed the weighing of the mails has been done solely by employees of the Post Office Department under the directions of the Postmaster General. In executing the provisions of these acts the Postmaster General divided the country geographically into four sections, designated the first, second, third, and fourth weighing sections, and weighed and readjusted the pay in one section each year. The above-mentioned routes of the claimant were in the first of said sections, and the quadrennial term of said section began with July 1, 1905, and expired June 30, 1909. The weighings upon which the pay of said routes was readjusted for this new term took place in the spring of 1905. By such reweighing the average daily weight carried over the whole length of each of said routes was found to be in excess of 5,000 pounds per day. The compensation during said term was based on a service of not less than six round trips per week.

III.

On February 8, 1905, the Post Office Department, in accordance with its long-standing practice, sent to claimant a distance circular, which was filled and returned by claimant to the department, and when so returned contained the matter following:

"No. 2504.

"No. of route, 107108, from —— to ——. (Read carefully.)

"Post Office Department,

"Office of the Second Assistant Postmaster General,

"Division of Railway Adjustment.

"Washington, D. C.,
"February 8, 1905.

"SIR: Please have this railroad distance circular carefully and properly filled and returned to this office as soon as possible. * * *

"Please have the statement verified by the engineer or other competent officer of the road, and have the acceptance on second page signed by the president or manager of the company and the seal of the company impressed on this circular.

* * * * * * *

"G. F. STONE,
"*Acting Second Assistant Postmaster General.*

"Mr. F. F. Chambers, Treas. Delaware, Lackawanna & Western R. R. Co., New York, N. Y.

"In case the Post Office Department authorizes the transportation of mails over this line, or any part of it, the railroad company agrees

to accept and perform the service upon the condition prescribed by law and the regulations of the department.

"W. H. TRUESDALE, *President.*

"The statement of distances contained herein is correct.

"L. BUSH, *Engineer.*

15 "Care should be exercised to state the title of the company actually operating the railroad in the blank space below, as the company therein named will be accepted as being entitled to the compensation for the service, and to prevent any misunderstanding as to title the seal of the company should be impressed.

"Title: The Delaware, Lackawanna & Western Railroad Company, State of N. Y., Penna., & N. J.

"Route No. 107108, from Hoboken to Buffalo.

"Approved by executive committee, May 23, 1905.

"J. N. SHAW."

Then followed a list of stations between Hoboken and Buffalo, the distance from station to station, distance from station to post office or postal station, and distance from post office and postal station to nearest point on railroad track.

On February 8, 1905, the Post Office Department sent a claimant a distance circular in all respects similar to that above described for route No. 107108, except that the route therein stated was numbered 109013 and was between Hoboken and Denville, N. J. The distance circular contained this provision: "In case the Post Office Department authorizes the transportation of mails over this line, or any part of it, the railroad company agrees to accept and perform the service upon the conditions prescribed by law and the regulations of the department." To this circular and stipulation was appended the signature of claimant's president, and the same was approved by its executive committee May 23, 1905.

IV.

The form of the said distance circular was as follows:

"No. 2504.

"No. of route, ——, from —— to —— (Read carefully.)

"Post Office Department,

"Office of the Second Assistant Postmaster General,

Division of Railway Adjustment.

Washington, D. C.,

"—— —, 190—

"SIR: Please have this railroad distance circular carefully and properly filled and return to this office as soon as possible.

"In column 1 state the distance from station to next station.

"In column 2 state the names of all railroad stations and points where mails will be exchanged, and in the order in which such points will be reached on outward trips, and designate the stations where your company has no agent or other employee by an asterisk (*).

In column 3 state the official name of all post offices and postal stations located not more than two miles from the nearest station or point where mails will be exchanged.

"In column 4 state the distance by the shortest practicable route open to public traffic between the nearest door of the baggage room and the nearest door of the post-office building where the receipt and delivery of mail is practicable.

16 "In column 5 state the distance by the shortest route open to public travel between the post office or postal station and the point on the railroad track nearest to each post office or postal station.

"State fractions of a mile decimally, using not more than two decimal figures.

"Please have the statement verified by the engineer or other competent officer of the road, and have the acceptance on second page signed by the president or manager of the company and the seal of the company impressed on this circular.

"1. Every railroad company is required to take the mails from, and deliver them unto, all terminal post offices, whatever may be the distance between the station and post office, except in cities where other provision for such service is made by the Post Office Department. In all cases where the department has not made other provision, the distance between terminal post office and nearest station is computed in, and paid for, as part of the route.

"2. The railroad company must also take the mails from and deliver them unto all intermediate post offices and postal stations located not more than 80 rods from the nearest railroad station at which the company has an agent or other representative employed, and the company shall not be relieved of such duty on account of the discontinuance of an agency without thirty days' notice to the department.

"3. The department will provide for the carrying of mails to and from intermediate post offices and postal stations located more than 80 rods from the nearest railroad station, and also to and from intermediate post offices and postal stations located 80 rods or less from the railroad station when the railroad company has no agent or other representative employed at such station.

"4. In all cases, the distance between the railroad station and the post office or postal station must be measured by the shortest route open to public travel, avoiding angles, from the nearest door of the baggage room to the nearest door of the post-office building where the receipt and delivery of the mails is practicable. In case there is no baggage room or station the measurement shall be made from the middle of the station platform where mails are exchanged. The route need not be a way regularly dedicated to public use; and if it be over private property, no prohibition against the Government

will be recognized which shall not also have been made and enforced against the general public.

"5. Any person acting for an advantage to himself or another, by authority or consent of the railroad company, and representing in any manner the interest of the company or railroad in its business transactions with the public, will be regarded as the company's agent or representative (Postal Laws and Regulations, 1902, section 1191).

"At connecting points where railroad stations are not over eighty rods apart a company having mails on its train to be forwarded by the connecting train will be required to transfer such mails and deliver them into the connecting train, or, if the connection is not immediate, to deliver them to the agent of the company to be properly dispatched by the trains of said company (section 1192).

"NOTE.—A well-established practice, such as railroads receiving and delivering mail matter at all offices within 80 rods of the road without extra charge, must be deemed to have been con-
17 sidered by Congress and the department when fixing the full rate of compensation for railroad mail transportation, and the pay for such service is included in the general compensation fixed for the routes. Where a railroad company performs such mail-passenger service without objection it is precluded from demanding further compensation than the rates allowed for the transportation of the mails (Railroad Company v. The United States, 21 Ct. Claims, 155).

"At places where railroad companies are required to take the mails from and deliver them into post offices or postal stations, or to transfer them to connecting railroads, the persons employed to perform such service are agents of the companies and not employees of the Postal Service, and need not be sworn; but such persons must be more than sixteen years old and of suitable intelligence and character. Postmaster will promptly report violation of this requirement (section 1193).

"At all points at which trains do not stop where the Post Office Department deems the exchange of mails necessary, a device for the receipt and delivery of mails satisfactory to the department must be erected and maintained, and pending the erection of such device the speed of trains must be slackened so as to permit the exchange to be made with safety (section 1200).

"—— ——,

"*Second Assistant Postmaster General.*

"Mr. —— ——, —— ——.

"In case the Post Office Department authorizes the transportation of mails over this line or any part of it, the railroad company agrees to accept and perform the service upon the conditions prescribed by law and the regulations of the department.

"—— ——, *President.*

"The statement of distances contained herein is correct.

"—— ——, *Engineer.*"

Following said matter were blank-form pages so arranged that the names of the successive stations, with the distances between each, were to be inserted.

Said distance circulars were executed before July 1, 1905, as above stated.

V.

After the claimant had returned the distance circular mentioned in Finding III, the Postmaster General issued the following order and notice to the claimant:

"*(Order.)*

"Post Office Department,

"Office of the Second Assistant Postmaster General,

"Washington, D. C.

"Orders of the Postmaster General, issued through the office of the Second Assistant Postmaster General Friday, September 15, 1905, originating or affecting an account.

18 "No. of order, —.

"*Order.*

* * * * * * *

"Railroad Service.

* * * * * * *

"B-5168 107108-N. Y., Hoboken, N. J., and Buffalo, 440.23 miles, 55.03 t. a. w., Delaware, Lackawanna & Western Railroad Co., a. d. w. 20, 718 lbs.

"From July 1, 1905, to June 30, 1909, pay the Delaware, Lackawanna & Western Railroad Company, quarterly, for the transportation of the mails between Hoboken, N. J., and Buffalo, N. Y., at the rate of $138,895.67 per annum, being $338.58 per mile for 440.23 miles, and for R. P. O. car service at the rate of $20,511.50 per annum, being $50.00 per mile for 440.23 miles for 1 line of 60-ft. cars between Hoboken and Buffalo.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

* * * * * * *

"W. S. SHALLENBERGER,

"*Acting Postmaster General.*"

"*(Notice.)*

"No. 2508*a*.

"Post Office Department,

"Office of the Second Assistant Postmaster General,

"Division of Railway Adjustment.

"Washington, D. C.,

"September 15, 1905.

"SIR: The compensation for the transportation of mails, etc., on Route No. 107108, between Hoboken and Buffalo, has been fixed from July 1, 1905, to June 30, 1909, under acts of March 3, 1873, July 12, 1876, and June 17, 1878, upon returns showing the amount and character of the service for 78 successive working days, commencing February 14, 1905, at the rate of $138,895.67 per annum, being $338.58 per mile for 410.23 miles and pay is allowed for use of R. P. O. cars from July 1, 1905, to June 30, 1909, at the rate of $20,511.50 per annum, being $50.00 per mile for 410.23 miles for 1 line 60 ft. cars between Hoboken and Buffalo.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

"Very respectfully,

"W. S. SHALLENBERGER,
"*Second Assistant Postmaster General.*

"Mr. F. F. Chambers, Treas., Delaware, Lackawanna & Western R. R. Co., New York, N. Y."

19 On February 8, 1905, the Post Office Department sent to claimant a distance circular in all respects similar to that described in Finding IV for Route No. 107108, except that the route therein stated was numbered 109013 and was between Hoboken and Denville, N. J. The distance circular contained this provision: "In case the Post Office Department authorizes the transportation of mails over this line, or any part of it, the railroad company agrees to accept and perform the service upon the conditions prescribed by law and the regulations of the department." To this circular and stipulation was appended the signature of claimant's president, and the same was approved by its executive committee May 23, 1905.

Thereafter, after the weighing of the mails had been completed and in pursuance of said circular and the information contained therein, an order was issued by the Post Office Department and a notice thereof sent to claimant as follows:

"*(Order.)*

"Post Office Department,

"Office of the Second Assistant Postmaster General,

"Washington, D. C.

"Orders of the Postmaster General, issued through the Office of the Second Assistant Postmaster General, Saturday, September 16, 1905, originating or affecting an account.

"No. of order, —.

"*Order.*

* * * * * * *

"Railroad Service.

* * * * * * *

"B-5309, 109013-N. J., Hoboken and Denville, 37.21 miles, 94.12 t. a. w., Delaware, Lackawanna & Western Railroad Company, a. d. w. 7, 725 lbs.

"From July 1, 1905, to June 30, 1909, pay the Delaware, Lackawanna & Western Railroad Company, quarterly, for the transportation of the mails between Hoboken and Denville, N. J., at the rate of $7,444.60 per annum, being $200.07 per mile for 37.21 miles.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

* * * * * * *

"W. S. SHALLENBERGER,
"*Acting Postmaster General.*"

20 "*(Notice.)*

"No. 2508.

"Post Office Department,

"Office of the Second Assistant Postmaster General,

"Division of Railway Adjustment.

"Washington, D. C.,

"September 16, 1905.

"SIR: The compensation for the transportation of mails, etc., on route No. 109013, between Hoboken and Denville, N. J., has been fixed from July 1, 1905 to June 30, 1909 (unless otherwise ordered),

under acts of March 3, 1873, July 12, 1876, June 17 1878, upon returns showing the amount and character of the service for 78 successive working days, commencing Feb. 14, 1905, at the rate of $7,444.60 per annum, being $200.07 per mile for 37.21 miles.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week.

"Very respectfully,

"W. S. SHALLENBERGER,

"*Second Assistant Postmaster General.*

"Mr. F. F. Chambers, Treasurer Delaware, Lackawanna & Western R. R. Co., New York, N. Y."

VI.

The act of Congress approved March 2, 1907, 34 Stats., 1205, 1212, entitled: "An act making appropriations for the service of the Post-Office Department for the fiscal year ending June thirtieth, nineteen hundred and eight, and for other purposes," contained the following provision:

"The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mail per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows:

"On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds, and on routes carrying their whole length an average weight of mail per day of more than forty-eight thousand pounds the rates shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds up to forty-eight thousand pounds, and for each additional two thousand pounds in excess of forty-eight thousand pounds at the rate of nineteen dollars and twenty-four cents upon all roads other than land-grant roads, and upon all land-grant roads the rate shall be seventeen dollars and ten cents for each two thousand pounds carried in excess of said forty-eight thousand pounds."

21 VII.

On September 12, 1907, the Postmaster General issued the following orders and on the same date notified the claimant of the department's action:

"(*Order.*)

"Post Office Department,

"Office of Second Assistant Postmaster General,

"Washington, D. C.

"Orders of the Postmaster General, issued through the Office of the Second Assistant Postmaster General, Thursday, September 12, 1907, originating or affecting an account.

"No. of order, —.

"*Order.*

* * * * * * *

"Railroad Service.

* * * * * * *

"B—19700 107108—N. Y., Hoboken, N. J., and Buffalo, N. Y., 410.23 miles, 55.03 t. a. w., Delaware, Lackawanna & Western Railroad Co., $138,895.67; R. P. O. $20,511.50; a. d. w. 20,718 lbs.

In accordance with act of March 2, 1907, from July 1, 1907, restate compensation for the transportation of mails so as to be at the rate of $135,457.94 per annum, being $330.20 per mile for 410.23 miles, and for R. P. O. car service at the rate of $16,409.20 per annum, being $40.00 per mile for 410.23 miles, Hoboken to Buffalo, for 1 line 60 ft. cars.

* * * * * * *

"G. v. L. MEYER,
"*Postmaster General.*"

"(*Notice.*)

"Post Office Department,

"Second Assistant Postmaster General,

"Division of Railway Adjustment.

"Washington.

"September 12, 1907.

"SIR: Under act of March 2, 1907, an order has been issued on route No. 107108, between Hoboken, N. J., and Buffalo, N. Y., restating compensation for the transportation of mails, from July 1, 1907, so as to be at the rate of $135,457.94 per annum, being $330.20

per mile, for 410.23 miles, and for R. P. O. car service at the rate of $16,409.20 per annum, being $40 per mile for 410.23 miles, Hoboken to Buffalo, for 1 line of 60 ft. cars.

"Very respectfully,

"J. T. McCLEARY,

"*Second Assistant Postmaster General.*

"Mr. F. F. Chambers, Treas. Del., Lack. & Western R. R. Co., New York, N. Y."

22 "(*Order.*)

"Post Office Department,

"Office of Second Assistant Postmaster General,

"Washington, D. C.

"Orders of the Postmaster General, issued through the Office of the Second Assistant Postmaster General, Thursday, September 12, 1907, originating or affecting an account.

"No. of order, —.

Order.

* * * * * * *

"Railroad Service.

* * * * * * *

"B—19710 109013—N. J., Hoboken and Denville, 37.21 miles, 94.12 t. a. w., Delaware, Lackawanna & Western Railroad Co., $7,444.60, a. d. w. 7,725 lbs.

"In accordance with the act of March 2, 1907, from July 1, 1907, restate compensation for the transportation of mails so as to be at the rate of $7,390.27 per annum, being $198.61 per mile for 37.21 miles.

* * * * * * *

"G. v. L. MEYER,

"*Postmaster General.*"

"(*Notice.*)

"Post Office Department,

"Second Assistant Postmaster General,

"Division of Railway Adjustment.

"Washington,

"September 12, 1907.

"SIR: Under act of March 2, 1907, an order has been issued on route No. 109013, between Hoboken and Denville, N. J., restating compensation for the transportation of mails from July 1, 1907, so as to be at the rate of $7,390.27 per annum, being $198.61 per mile for 37.21 miles.

"Very respectfully,

"J. T. McCLEARY,

"*Second Assistant Postmaster General.*

"Mr. F. F. Chambers, Treas., Del., Lack. & Western Railroad Company, New York, N. Y."

The annual payments mentioned in the order and notice of 1907 amounted, on one of said routes, to $138,895.67. This sum was paid to the claimant annually in quarterly payments from July 1, 1905, to June 30, 1907. Claimant was paid for both of said routes annually the sum of $146,336.27. From July 1, 1907, to June 30, 1909, there was paid to the claimant annually in quarterly payments the sum of $142,848.21 for carrying the mails on both of said routes. The difference between what claimant would have received under the said contract of 1905 and what it was paid after the readjustment
23 of 1907 for the two years beginning July 1, 1907, and ending June 30, 1909, is the sum of $6,976.12.

Said reduction of compensation was made without any reweighing of the mails.

VIII.

Upon the receipt by the claimant from the Post Office Department of the Treasury warrant for services for the quarter commencing July 1, 1907, and ending September 30, 1907, the following correspondence took place between the claimant and the Postmaster General. On October 16, 1907, the claimant wrote the Postmaster-General as follows:

"Referring to the warrant of your department amounting to $3,163.00 and purporting to cover compensation for service performed by the D. L. & W. R. R. Co. in transporting mails over the postal routes grouped under route No. 109013, for the quarter ending October 1st, 1907, we do hereby notify you that we accept the said warrant under protest, and object to the reduction attempted to be

made in the rate of compensation for mail service performed on said routes, upon the ground that we have a contract with your department for the transportation of the mails over said routes for a period of four years from July 1st, 1905, at a stated compensation therein mentioned, which is greater in amount than that represented by your warrant, and that the said compensation set forth in said contract can not be legally changed during the life of said contract, and upon the further ground that the reduced compensation which your department now tenders is unreasonably low for the services performed and to be performed. We further object that the notice of the said reduction was not received by us until the service for the quarter ending October 1st, 1907, had been nearly performed.

"We do further protest against the proposed reduction in the compensation for service in the transportation of mails on route No. 107108, Hoboken-Buffalo, upon the same grounds as those above set forth.

"You will further take notice that we demand, and intend to collect, the compensation provided for in the contract covering the routes hereinbefore mentioned, and have accepted the warrant mentioned as part compensation only for the services performed during the quarter to which it applies."

On October 19, 1907, the Postmaster General replied as follows:

"Your letter of the 16th instant has been received, in which you acknowledged receipt of the warrant covering compensation for service performed by your company in transporting the mails over routes 109013 and 107108 and protest upon the ground that you have a contract for transporting the mails for four years at a stated compensation greater than that represented by the warrant and upon the further ground that the reduced compensation is unreasonably low for the service performed.

"In reply I have to advise you that such contract as exists between the United States and the railroad company is subject to all the provisions of law with respect to the establishment and maintenance of railroad-mail service and to the postal regulations with reference thereto. Although the rate of compensation is stated for a
21 term of four years, it is by the terms of both the order adjusting the pay for the term and the notice sent to the company in accordance therewith made 'subject to future orders.' The act of Congress approved March 2, 1907, authorizes and directs the Postmaster General to readjust the compensation to be paid from and after the 1st day of July, 1907, for the transportation of mail upon railroad routes. The before-mentioned reservation in the order and notice enables him to exercise the authority conferred upon him and comply with directions given in the act of Congress above mentioned. Accordingly the rates of compensation stated for your service upon the routes in question have been readjusted as provided by law, and the compensation for service is consistent with the order and notice.

"As to the second ground of objection, I have to suggest that the rates at which the compensation has been stated are the maximum rates fixed by law.

"With reference to your statement that the notice of the reduc-

tion was not received until the service for the first quarter had been nearly performed, I have to state that the computations necessary for the readjustment upon the statute were completed as early as practicable and notice of such readjustment for your routes was sent to you on September 12, 1907. However, as the requirement for the reduction was a matter of statutory provision in the act approved March 2, 1907, which by its terms became effective July 1, 1907, and of which all persons are presumed to have knowledge, it does not appear that any delay in notifying the company of the effect of the statute would work any disadvantage to it.

"In regard to your statement that you demand and intend to collect compensation at the rates previously stated, I beg leave to advise you that the new adjustment is in accordance with law and the reservation of the contract and that any service performed since the 1st of July, 1907, and to be performed hereafter during the term must be with the understanding that the compensation shall be at not exceeding the rate of pay fixed in the readjusting orders."

On November 19, 1907, the claimant again wrote the Postmaster General as follows:

"I am advised that two warrants of your department in the amounts of $33,271.50 and $4,102.30, respectively, and purporting to cover compensation for service performed by the Delaware, Lackawanna & Western Railroad Company in transporting mails over the postal routes grouped under Route No. 107108 for the quarter pending October 1st, 1907, have been received.

"I desire to again notify you that the said warrants are accepted in part compensation only for the above-mentioned services performed, and further, that by accepting said warrants we do not thereby acquiesce in the lesser compensation represented by the amount of said warrants than we are entitled to receive under our contract with your department as per the notice of adjustment under date of September 15th, 1907; nor do we thereby assent to the lesser compensation in the future, which you assume to fix in your notice of September 16th, 1907.

"Our position in this matter is that the Government, having contracted with our company to carry its mail for four years at a fixed compensation, can not legally during the term of contract, restate the compensation to us for such service. Also that the restated
25 amount is not adequate compensation for the service rendered. This is a question of law which can be, as it seems to me, determined by the proper tribunals without necessitating our refusal to carry mail over the route in question, thus inconveniencing the Government and the public, provided you do not insist upon our taking such course. In other words, I appreciate that your position is that the Government has the right to so restate our compensation, and that the restated amount is adequate for the service. If it be understood that the receipt *of* us *by* these warrants in amounts less than is provided by the contracts is without prejudice to or without any waiving of our right under the contracts, leaving the disputed question to be determined, I see no objection to our continuing to carry the mail. I deem it necessary, however, that this undertak-

ing be confirmed by letter from you, as otherwise it might be held that by accepting warrants for less than the contract amounts, and by continuing to carry the mails after notice of the action of the Government in restating our compensation, we had acquiesced in the right of the Government so to do and waived our claim under the contracts. I assume there is no possible objection to your so advising us, for the Government would certainly not desire to illegally reduce our compensation, and if its action be legal, as contended by you, under advices, as I am informed, by the Attorney General, such letter can in no way prejudice your rights. An early reply will be appreciated."

On November 25, 1907, the Postmaster General replied to the last-named letter, as follows:

"Your letter of the 19th instant is received, in which you give notice that the warrants received for the performance of service during the September, 1907, quarter are accepted in part payment only, and that by accepting the warrants you do not acquiesce in the lesser compensation represented thereby nor assent to the lesser compensation fixed by the notice of September 16, 1907, for future service.

"Your statement with reference to the position of the company in the matter and your views as to the effect of the acceptance of the warrants and continuance of service have been carefully considered. The department does not hold the same views. The contract that exists between the Government and the company does not fix an invariable rate of compensation for the term. By the terms of both the order of adjustment and the notice sent to the company, the rate is made 'subject to future orders.' Any statement of the rate of pay during the term is, therefore, in accordance with the reservation made in the order and in the notice. It is open to the company to accept the terms of the readjustment and continue the service upon them or decline those terms and cease the performance of service. If it continues the service, it will have accepted the new rate of compensation, and, in the opinion of the department, will have no ground for recovery at a greater rate.

"The position of the department in regard to the issuance of the orders restating the compensation is that the act of March 2, 1907, directs the Postmaster General to readjust the same from and after the 1st day of July, 1907, upon the rates stated therein. This is mandatory and requires a complete readjustment for all transportation of the mails on railroad routes and necessarily applies to every route upon which the department has no formal contract under which the company is obliged to carry the mails for a fixed
26 period at a stated rate. As mentioned *about*, the contract with the company is not of this character.

"This position is in accord with the uniform practice of the department since the first readjustment reducing pay *were* made under the law of 1876, and has been sustained by the courts. See the case of Eastern Railroad Company vs. The United States, 129 U. S., 391. When Congress provided for a reduction of five per cent by the act of Congress of 1878 the department readjusted the rates of compensation for all service in the same manner that the readjust-

ment- have been made under the act of 1907. The same question was raised as to the nature of the contracts and the rights and obligations of the companies under such contracts and readjusting orders. The department took the same position at that time that is now taken and was sustained by the Supreme Court of the United States in the case above mentioned.

"In regard to your statement that the amount carried by the readjusting order is not adequate compensation for the service rendered I have to advise you that this question is one which should be submitted to Congress, as that body fixes the maximum rates which may be allowed by the Postmaster General.

"This letter has been made full and explicit in reply to your frank statement as to your views, and in order that you may be fully advised as to the opinion of the department upon the questions raised."

On December 12, 1907, the claimant again wrote the Postmaster General as follows:

"I am in receipt of your letter of November 25th in reply to mine of November 19th on the subject of the compensation to be paid our company for the carriage of mails on routes No. 107108 and No. 109013, between Hoboken and Buffalo, N. Y., and Hoboken and Denville, New Jersey.

"In my letter I endeavored to make clear that our desire was to suggest an alternative to so radical a step by us as a refusal to carry mails on these routes, namely, that we continue to carry the same without prejudice to our rights to the full compensation named in the contracts of September 15th and 16th, 1905. I read your reply as an insistence upon our accepting your views of the law on the subject and a refusal to assent to our accepting warrants on account of carriage of mails on these routes without prejudice to such rights. You say in your letter, 'It is open to the company to accept the terms of the readjustment and continue the service upon them or decline those terms and cease the performance of service. If it continues the service, it will have accepted the new rate of compensation and, in the opinion of the department, will have no ground for recovery at a greater rate.' I hope you can advise me that I have misinterpreted your letter. If not, however, and you still take this position, we have no alternative but to decline to perform the service, and you will please arrange for the carriage of the mail on these routes with other carriers at the earliest possible moment, advising us when the same is consummated. This must result in great and, as it seems to me, unnecessary inconvenience to the public.

"We assume that you will not desire us to forthwith stop carrying the mails on these routes without advising you and affording you a reasonable opportunity to arrange for carriage by others.
27 Until such time, however, we apprehend that you fully understand that we reserve the right to the full compensation named in the contracts for the performance of this service.

"I fail to appreciate your reasons, if you are right in your view of the law, in declining to assent to our willingness to carry the mails for restated compensation, provided our rights under the contracts are not prejudiced thereby."

And on December 23, 1907, the Postmaster General replied as follows:

"Your letter of the 12th instant in reply to that of the Postmaster General of the 25th ultimo, in relation to mail service by your company on routes Nos. 107108 and 109013 and compensation therefor, is received.

"I understand from your letter that you desire to arrange with the department for a continuance of service under the readjusting orders, without prejudice to any rights which you may have to a higher rate of compensation, provided you are in law entitled to such higher rate under the contract which existed prior to July 1, 1907.

"The position of the department is that such contract as existed between the Government and the company by reason of the readjustment of pay for the four years beginning July 1, 1905, did not fix an absolute rate of compensation for the term, and that the term of such contract, as evidenced by both the order of adjustment and the notice sent to the company, provides that the rate of pay fixed by the readjustment order is 'subject to future orders.' The Postmaster General is therefore at liberty under these terms to restate the rate of compensation. The compensation has been restated in accordance with the provisions of the act of March 2, 1907, which is mandatory and leaves no discretion in the Postmaster General. The service may be continued by you, but it must be with the distinct understanding that there is no agreement on the part of the department to pay for the same at a higher rate than that fixed by the readjusting order issued in accordance with the act above referred to. There is no objection, however, to your reserving any legal right which you may have under the contract existing prior to July 1, 1907, and resorting to legal procedure for the determination of the same if you choose to do so."

The first of said letters from claimant was by its assistant treasurer. In the remaining correspondence claimant was represented by its general attorney, who signed its letters.

IX.

The average weight per day of mail carried over the whole length of the routes, respectively, had been ascertained according to law prior to July 1, 1905, the beginning of the term of service for which compensation had been stated as shown in Finding V.

X.

The Postal Laws and Regulations of 1902, in effect in 1905, provided, among other things, as follows:

"Sec. 1162. The Postmaster General shall arrange the railway routes on which the mail is carried, including those in which
28 the service is partly by railway and partly by steamboat, into three classes, according to the size of the mails, the speed at which they are carried, and the frequency and importance of the

service, so that each railway company shall receive, as far as practicable, a proportionate and just rate of compensation, according to the service performed. (Sec. 3997, Rev. Stats.)

"Sec. 1163. The Postmaster General may enter into contracts for carrying the mail, with railway companies, without advertising for bids therefor. (Sec. 3942, Rev. Stats.)

"Sec. 1165. All railway companies to which the United States have furnished aid by grant of lands, right of way, or otherwise, shall carry the mail at such prices as Congress may by law provide; and, until such price is fixed by law, the Postmaster General may fix the rate of compensation. (Sec. 4001, Rev. Stats.)

"Sec. 1170. If the Postmaster General is unable to contract for carrying the mail on any railway route at a compensation not exceeding the maximum rates herein provided, or for what he may deem a reasonable and fair compensation, he may separate the letter mail from the other mail, and contract, either with or without advertising, for carrying such letter mail by horse express or otherwise, at the greatest speed that can reasonably be obtained, and for carrying the other mail in wagons or otherwise at a slower rate of speed. (Sec. 3999, Rev. Stats.)"

The foregoing regulations appear in chapter 3 relating to the transportation of mails by railroads.

In chapter 7, relating to the transportation of mails on steamships, steamboats, and star routes, Subhead IV, advertisements for proposals for the mail service, there is a section as follows:

"Sec. 1253. The United States shall be divided into four contract sections. A general letting for one of these sections will occur every year, and contract will be made for four consecutive years, commencing on the 1st day of July. The sections and their current contract terms are:

"(*a*) Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, Connecticut, New York, New Jersey, Pennsylvania, Delaware, Maryland, District of Columbia, Virginia, and West Virginia; current term, July 1, 1901, to June 30, 1905.

"(*b*) North Carolina, South Carolina, Georgia, Florida, Alabama, Mississippi, Tennessee, Kentucky, and Porto Rico; current term, July 1, 1900, to June 30, 1904.

"(*c*) Ohio, Indiana, Illinois, Michigan, Wisconsin, Minnesota, Iowa, and Missouri; current term, July 1, 1899, to June 30, 1903.

"(*d*) Arkansas, Louisiana, Texas, Indian Territory, Oklahoma, Kansas, Nebraska, North Dakota, South Dakota, Montana, Wyoming, Colorado, New Mexico, Arizona, Utah, Idaho, Washington, Oregon, Nevada, California, Alaska, and Hawaii; current term, July 1, 1898, to June 30, 1902."

Also:

"Sec. 1277. The Postmaster General may discontinue or curtail the service on any mail route, in whole or in part, in order to place on the route superior service, or whenever the public interests, in his judgment, shall require such discontinuance or curtailment for any other cause, he allowing as full indemnity to the contractor

29 one month's extra pay on the amount of service dispensed with, and a pro rata compensation for the amount of service retained and continued."

It is provided by Revised Statutes, sections 3942 and 3956, as follows:

"Sec. 3942. The Postmaster General may enter into contracts for carrying the mail, with railway companies, without advertising for bids therefor.

"Sec. 3956. No contract for carrying the mail shall be made for a longer term than four years, and no contract for carrying the mail on the sea shall be made for a longer term than two years."

Conclusion of Law.

Upon the foregoing findings of fact the court decides, as a conclusion of law, that the claimant is entitled to judgment in the sum of six hundred and ninety-eight dollars and thirty-nine cents ($698.39).

Opinion.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

In Chicago & Northwestern Ry. Co. v. United States, 104 U. S., 680, it was held that where the railroad company had a contract for a term of four years at a stipulated price to carry the mails the price could not be reduced during the term by the Post Office Department without the former's consent. That road was a land-grant road; and in Chicago, M. & St. P. Ry. Co., case, 104 U. S., 687, the same ruling was made. In each of said cases an attempt had been made by the Postmaster General to reduce the compensation stated in the contract because of the direction to do so contained in the act of July 12, 1876. The court held that they could recover the price stated in the contract.

In Eastern Railroad Co. v. United States, 129 U. S., 391, a reduction had been made by the Postmaster General in the compensation stated in the contract because of the act of June 17, 1878, and it was held that the company could not recover the difference between what was paid to it upon the reduced basis and what it would have received under the original basis of compensation. The court distinguishes the case from that of Chicago, etc., Ry. Co., supra, saying (p. 396): "That case differs from the present one in the important particular that in the former the company bound itself to carry the mails during a certain period, and, consequently, its acceptance from time to time during that period of less than it was entitled to demand did not prejudice its right to claim what was legally due under its contract, whereas in the present case the company could have declined to accede to the readjustments of rates when they were made."

It was declared that this court had properly said that the order for the reduction under the act of 1878 and the notice thereof to the company "constituted an offer on the part of the Postmaster General

which the claimant might decline or accept at his pleasure," and the Supreme Court added: "Having received the reduced compensation without protest or objection it may be justly held to have accepted that offer." (Opinion, p. 396.)

The facts of the instant case are not materially different from the facts of the Eastern Railroad case, as stated by Mr. Justice Harlan, except in the particular that in the Eastern Railroad case the claimant made no protest or objection to the reduction in the compensation and received the same. In the instant case there was a protest, the effect of which is to be considered later. The principle upon which the Eastern Railroad case proceeds is that the contract between the parties provided that the compensation could be readjusted and therefore that "it cannot be said that the reduction of five per cent was a violation of that contract, for, according to its terms, the parties agreed that the rates fixed * * * were subject to such future orders as the Postmaster General might make."

In the instant case, a "distance circular" had been sent by the Postmaster General to plaintiff, who signified its willingness, by an indorsement thereon duly returned to the Post Office Department, to transport the mails as follows: "In case the Post Office Department authorizes the transportation of mails over this line, or any part of it, the railroad company agrees to accept and perform the service upon the conditions prescribed by law and the regulations of the department." After the return of the distance circular with the information it called for and the said indorsement thereon by the plaintiff company, the Postmaster General made an order and gave a notice to plaintiff stating that "the compensation for the transportation of mails, etc., on route No. 107,108, between Hoboken and Buffalo, has been fixed from July 1, 1905, to June 30, 1909," under certain named acts, "upon returns showing the amount and character of the service," at a designated rate per annum, and it was added, in both the order and notice, that "This adjustment is subject to future orders and to fines and deductions and is based on a service of not less than six round trips per week." There were two routes on plaintiff's lines, and the orders and notices were substantially the same as to both.

The distance circular, and plaintiff's said indorsement thereon, taken in connection with the orders and notices of the Postmaster General stating the compensation, and the action of plaintiff thereafter in carrying the mails and receiving the said compensation, evidence the contract between the parties. Until the rates were stated and acted upon there was no acceptance by the plaintiff of the offer of the Government, and when acted upon the rights of the parties became fixed, subject to the terms of the offer itself, which were, as has been said, that the compensation would be subject to readjustment. Reserved as it was in the offer, the right of future adjustment was reserved in the contract of which the offer was a part, because what we designate as the "offer" was the order and notice of adjustment under which plaintiff acted, and, by acting under it, accepted. Prior to such order and notice in 1905 the plaintiff had indicated a willingness to carry the mails "in case" the department

authorized it, and the order and notice, or some similar action by the department, was essential to convert the conditional expression by the plaintiff into an actual undertaking; but the plaintiff's indorsement on the distance circular did not say or imply that the plaintiff would be bound to transport the mails at a price unreasonably low or at any price. It had the option of refusing to carry the mails at the rate fixed subsequently in 1905. Eastern Railroad case, supra.

31 In the instant case the Postmaster General reduced the compensation stated in said orders and notices, because of the direction contained in the act of March 2, 1907, 34 Stats., 1212, which is similar to the act of 1878 considered in the Eastern Railroad case.

The contracts in the instant case contain the same reservation in effect as were involved in that case. As was there said (p. 395): "This reservation of power in the Postmaster General opened the way for him to exercise the authority conferred and to conform to the direction given by the act of 1878," or, in the instant case, by the act of 1907.

We are governed by the decisions of the Supreme Court, and the Eastern Railroad case controls the instant case unless the plaintiff's protest be held to make a difference. It is well established that a contract may contain an express provision that one or either party may terminate such contract at his option. 3 Paige Contr. Sec. 1360. It may be conceded that the parties contemplated that the arrangement effected in 1905 would probably continue for four years at the stated compensation, but the right was nevertheless reserved to make readjustments by future orders. The "future order" came in the act of 1907, and when acted upon by the department the readjustment was made as Congress directed that it should be made. We can not assent to the argument that the act of 1907 was intended to apply only to roads whose contracts expired by limitation after its enactment. Its terms do not admit of that construction. It was designed to make a reduction in the compensation being then paid to any and all roads. It could not lawfully be applied to roads which had contracted with the Postmaster General for a definite period at a fixed compensation. Chicago, etc., Ry. Co. case, 104 U. S., 680. It could be applied to contracts with roads containing the reservation of the right to readjust the compensation by future orders. Eastern Railroad case, supra. Plaintiff's contract came within the latter class.

The option thus secured to the Government did not have the effect, however, of requiring the railroad company to carry the mails at the reduced rate. Its obligation was to carry them at the compensation stated in the orders and notices of 1905, and when reduced under the authority and direction of the act of 1907 it was free to refuse to go forward under the reduced rates. As said by Mr. Justice Harlan in the Eastern Railroad case: "We do not mean that the railroad company was bound to continue the carrying of the mails if subsequent changes in the rates were unreasonable or did not meet with its assent. On the contrary, it was at liberty when the five per

cent reduction was made to discontinue their transportation on its cars." In fact, that right was admitted in the correspondence which ensued between the Postmaster General and the general attorney of the company when the latter was protesting against the former's action.

The Postmaster General in his letter of November 25, 1907, after stating the position of the Government under the terms of the contracts, which he insisted reserved authority to make the reduction, said: "It is open to the company to accept the terms of the readjustment and continue the service or decline those terms and cease the performance of service."

32 It is, however, insisted by plaintiff that if the act of 1907 could be put into effect upon plaintiff's road at all, the mails should first have been reweighed. We think it clear that the department had a right to reweigh the mails, but it did not do so, nor did plaintiff demand that it should. It would have been perhaps a practical impossibility to reweigh the mails on all the railroad mail routes in the country where there were contracts similar to that of plaintiff in any reasonable time. We fail to see how the fact that the mails were not reweighed affect the plaintiff's case. "Having the right reserved in the contract to readjust the rates the Postmaster General proceeded to do so." "Chief Justice Richardson, speaking for the Court of Claims, properly said that the order for the reduction under the act of 1878 and the notice thereof to the company 'constituted an offer on the part of the Postmaster General which the claimant might decline or accept at his pleasure.'" Per Mr. Justice Harlan in Eastern Railroad case (p. 396). The failure to weigh the mails anew in accordance with the act of 1873 and acts supplementary thereof did not affect the right reserved in the contract and exercised by the Government. It made an offer which plaintiff was free to accept or refuse. The effect of said action by the Government was necessarily a termination of the compensation as stated in 1905, there being no term in the contract which constituted a condition that the mails be reweighed before an adjustment under future orders could be made. What then was the effect of plaintiff's protest and objection? Plaintiff was duly informed of the reduction. It was tendered the option which it already had of declining the offered terms, but it insisted upon its rights under the contract of 1905. Speaking through its general attorney, it said to the Postmaster General in its letter of December 12:

"I fail to appreciate your reasons, if you are right in your view of the law, in declining to assent to our willingness to carry the mails for restated compensation provided our rights under the contracts are not prejudiced thereby."

To which the Postmaster General replied:

"The service may be continued by you, but it must be with the distinct understanding that there is no agreement on the part of the department to pay for the same at a higher rate than that fixed by the readjusting order issued in accordance with the act above referred to. There is no objection, however, to your reserving any legal right which you may have under the contract existing prior

o July 1, 1907, and resorting to legal procedure for the determina-ion of the same if you choose to do so."

Manifestly, plaintiff's objection to the readjustment could not keep in effect the adjustment of 1905 if the department was authorized by the contract to modify it, and did so in accordance with the contract. Texas & Pac. Ry. Co. case, 28 C. Cls., 379, 390. That it could properly do so and that it did effectually make a readjustment are sustained by the ruling in the Eastern Railroad case. The contract reserved the right and the Postmaster General duly exercised it. Such being the case, "it cannot be said that the reduction of five per cent (or the smaller reduction) was a violation of that contract." When, therefore, plaintiff expressed a "willingness to carry the mails for restated compensation, provided our rights under the contracts are not prejudiced thereby," and the Postmaster General replied as above stated, it is clear that his protest and objection went no further than an assertion that the contract of 1905 continued in force, notwithstanding the fact that the adjustment had been lawfully and according to the express reservation in the contract itself restated by defendants. Suing, as it does in this action, upon the contract of 1905, the answer must be that there has been no violation of it by the defendants. If a mere protest or objection by plaintiff could keep the 1905 contract in force notwithstanding the department's action under the act of 1907, it is manifest that this right of adjustment expressly reserved in the contract could amount to nothing. The protest or objection to the change might go to the question of compensation as readjusted. It could not restore or keep in force the contract of 1905 if the department could make and did properly make the later adjustment. In other words, plaintiff could accept the readjustment, which was in effect a new offer, or it could refuse to carry the mails on the terms offered. It sought to claim that the contract of 1905 was still in effect, and, by protesting against the change, to reserve the right to so claim. We decide that said contract was not in effect, and that there was no violation by the defendants of that contract in making the new adjustment, and hence that the protest avails nothing in this case. Eastern Railroad Co. case. By continuing the transportation of the mails under the restated offer of the department, the plaintiff either assented to the terms of the offer or there was no contract at all between the parties. Tex. & Pac. Ry. Co. case, 379. If it assented as under the terms of its protest and the Postmaster General's reply, we think the more reasonable view to be that it did, there is, of course, an end of this case. If it be held that it did not assent, then in the absence of an express contract its right of recovery would be based upon an implied obligation to pay the reasonable value of the services rendered as upon a quantum meruit. No such claim has been advanced in this case and there is no evidence upon which to base it. It is not shown that the weights of the mails were greater or less than those found in 1905, and no presumption can be indulged as to that fact. If the price fixed in 1905 were attempted to be used in case the weights in 1907 were shown as evidence of what was a fair or reason-

able price for the new weights we would be confronted with the condition stated in the Postmaster General's letter to plaintiff's general attorney relative to the terms upon which the service could be continued. Plaintiff alleges that it had four-year contracts, and sues to recover the amounts it would have received under their terms less what it was paid. It appears, however, that the orders and notices under the act of 1907 were issued on September 12, 1907. The plaintiff was paid for the quarter beginning July 1 and ending September 30, 1907, at the rates stated in the readjusting orders and notices. We think it was entitled to receive the rates fixed by the 1905 orders until they were changed by the Postmaster General as directed by the act of 1907, and thereafter to be paid under the new rates. The difference between the two rates up to September 12 was $698.39, and for this difference plaintiff should have judgment. As to the balance of its claim it is not entitled to recover under the principles stated in the Eastern Railroad case.

Barney, Judge, and Downey, Judge, concur.

Booth, Judge, not sitting.

34 V. *Judgment of the Court.*

At a Court of Claims held in the City of Washington on the 5th day of June, A. D., 1916, judgment was ordered to be entered as follows:

The Court, upon due consideration of the premises find in favor of the claimant, and do order, adjudge, and decree that the claimant, the Delaware, Lackawanna and Western Railroad Company, as aforesaid, have and recover of and from the United States, the sum of Six Hundred and Ninety-eight Dollars and thirty-nine cents ($698.39).

By THE COURT.

35 VI. *History of Proceedings After Entry of Judgment.*

On August 4, 1916, the defendant filed a motion for a new trial with brief in support thereof.

On September 14, 1916, the claimant filed a motion for amendment of findings and new trial with brief in support thereof.

On October 16, 1916, the above motions were ordered to the Law Calendar for argument.

On October 23, 1916, the motions were argued by Messrs. Benjamin Carter and F. Carter Pope for the claimant, and by Messrs. Joseph Stewart and J. Robert Anderson for the defendant, and submitted.

On October 30, 1916, the claimant's motion to amend findings and for new trial and the defendant's motion for new trial were overruled by the Court.

36 VII. *Claimant's Application for, and Allowance of, Appeal.*

From the judgment rendered in the above entitled cause on the

30th day of October, 1916, the claimant, by its attorney in fact, hereby, on the 6th day of January, 1917, makes application for and gives notice for an appeal to the Supreme Court of the United States.

BENJM. CARTER,
Attorney for Claimant.

Filed January 6, 1917.

Ordered: That the above application be allowed as prayed for.
Feb. 23, 1917.

By THE COURT.

37 Court of Claims.

No. 30364.

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY

vs.

THE UNITED STATES.

I, Samuel A. Putman, Chief Clerk of the Court of Claims, certify that the foregoing are true transcripts of the pleadings in the above-entitled cause; of the findings of fact and conclusion of law; of the opinion of the Court; of the judgment of the Court; of the history of proceedings after entry of judgment; and of the application of the claimant for, and allowance of, an appeal to the Supreme Court of the United States.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court of Claims this 19th day of March, A. D. 1917.

[Seal Court of Claims.]

SAMUEL A. PUTMAN,
Chief Clerk Court of Claims.

Endorsed on cover: File No. 25,853. Court of Claims. Term No. 453. The Delaware, Lackawanna & Western Railroad Company, appellant, vs. The United States. Filed March 24th, 1917. File No. 25,853.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 158.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY

vs.

THE UNITED STATES.

Appellant's Motion to Remand to the Court of Claims, With Brief.

BENJAMIN CARTER,
Attorney for Appellant.

F. CARTER POPE,
Of Counsel.

THE LAW REPORTER PRINTING COMPANY, WASHINGTON, D. C.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1918.

No. 158.

DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY

vs.

THE UNITED STATES.

Appellant's Motion to Remand to the Court of Claims with Instructions to Find Additional Facts.

Comes the appellant, by its attorney, and shows to the court:

(1). That the matter complained of in this suit is that, in interpreting and applying an act of Congress approved March 2, 1907, the Postmaster General made deductions, for the two years, July 1, 1907, to June 30, 1909, from appellant's compensation for transportation of the mails on two mail routes as previously fixed for a four-years term commencing on July 1, 1905.

(2). That in making preparations for the mail service on said routes during said term the Postmaster

General sent to appellant with respect to each of said routes a letter in the following form:

"2519

POSTOFFICE DEPARTMENT
OFFICE OF THE SECOND ASSISTANT POSTMASTER GENERAL
DIVISION OF RAILWAY ADJUSTMENTS.
WASHINGTON, D. C., *February 8, 1905.*

SIR: The General Superintendent, Railway Mail Service, has been directed to weigh the mails carried on Route No. ——— between ——— and ———, for not less than thirty successive working days commencing February 14, 1905, for the purpose of obtaining the data upon which the Department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same), from July 1, 1905, to June 30, 1909.

The law requires that the weighing be done by sworn employees of the Postoffice Department and all Postoffice Department employees will be instructed to take every precaution to secure correct weights, to provide against all irregularities, and to prevent any diversion of mails from their usual channels during said weighing.

This office, through the Superintendent Railway Mail Service for the division in which your road is located, will advise your company relative to the requirements of the Department in connection with said weighing.

Very respectfully,
(Signed) G. F. STONE,
Acting Second Assistant Postmaster General."

(3). That in said action the Postmaster General followed a long established, continuous practice of the Postoffice Department.

(4). That the foregoing, as appellant is advised,

are material facts in this case, and if they are not presented to this court in the record justice can not be done to appellant in the decision of the case.

(5). That at the hearing of the case in the Court of Claims the court was requested to find these facts, and the facts were admitted by the defendant, but the court did not find these facts nor did it make any finding in relation thereto.

(6). That there are a number of other cases pending in the Court of Claims, of other claimants, upon causes of action practically identical with that presented in this case and it is assumed that the decision of this court will govern those cases.

Wherefore appellant moves this court to remand this cause to the Court of Claims with directions to find, from the evidence now on its record and any other competent evidence, whether or not:

First, The Postmaster General sent said letter to appellant as is alleged herein; and

Second, Whether or not the sending of said letter was in accordance with the long-standing practice of the Postmaster General.

A brief on this motion is filed herewith.

BENJAMIN CARTER,
Attorney for Appellant.

F. CARTER POPE,
of Counsel.

BRIEF.

This is one of several cases before the Court of Claims in which the right of the Postmaster General to apply the reduced rates provided in the act of Congress of March 2, 1907 (34 Stats. Ch. 2513, p. 1212; Record, P. 15) during the current contract term of four years is denied by the railroad companies. The controlling question

is, whether there was a four-years contract, and it is the contention of appellant that this can be determined only by consideration of the pertinent statutes, the practices of the Postoffice Department under those laws, and the several steps in the negotiations between the parties at the readjustment of 1905.

It will be observed (Record, pp. 26-27) that the Court of Claims rests its decision in this case on the Eastern Railroad case, 129 U. S., 391. The reason for this decision was that the last communication between the parties was a notice sent by the Postmaster General to appellant in September, 1905, that its pay had been fixed for four years from the first of the preceding July at so much per annum on each route, with the statement that "This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week." That statement in the notice is held to be the contract.

Examination of the findings of fact made by the Court of Claims in the Eastern Railroad case, 20 Ct. Cls., 23 *et seq.*, will disclose a number of differences between the facts in that case and the whole facts in the instant case, which we shall point out in more detail when we come to brief this case. For the purpose of this motion it is sufficient to refer to the circumstances (1) that the Postmaster General did not send the Eastern Railroad Company such a letter as we seek to establish in this case; (2) that he did not send the Eastern Railroad Company the same distance circular that he sent this appellant; (3) that the Eastern Railroad Company did not execute any agreement whatsoever, as this appellant did—which agreement must have had *some sort* of meaning and effect; in short, that the *only* thing by way of a contract that the Eastern Railroad Company had was a mere notice (20 Ct. Cls., 30) from the Postmaster General that

its compensation had been fixed for a period of four years, "unless otherwise ordered," at annual rates stated.

It will also be observed that the "agreement clause" on the distance circulars herein read as follows (Record, foot of p. 11):

> "In case the Post Office Department authorizes the transportation of mails over this line or any part of it, the railroad company agrees to accept and perform the service upon the conditions prescribed by law and the regulations of the Department."

This agreement does not specify the length of time for which it is to run. The first natural inquiry of a logical mind would be on that point, and the first natural conclusion of a logical mind would be that the duration of the contract was specified in some other communication between the parties. It is on the idea that the letter which the Postmaster General wrote the appellant contains this specification we have endeavored, and now endeavor, to get the letter into the record. Other incidents of this contract will be shown by public records, of which this court has judicial knowledge; but no fact in the case can better aid in establishing the terms of the contract than would this letter.

In reference to this letter claimant's brief, on its motion for amendment of findings in the Court of Claims, stated:

> "The fact here asked to be found or denied, will show, or tend to show, the Government's own interpretation of the extent and scope of its contract with claimaint to carry the mails. Whether it is relevant and material is a question which may well be left to determination by the reviewing court when it comes to consider the contentions made by claimant. The fact itself can not be denied.

> "On the whole, it can do the defendant's case no harm to find the facts upon the subject matters presented if they are ultimately held to be irrelevant and immaterial. If they *are* relevant and material it might and possibly would do the claimant's case irreparable injury if said facts are not incorporated in the findings of fact."

Defendant's brief said on this point, not denying the facts:

> "However, the defendants submit that this *and all other* alleged facts covered by claimant's requests, except such as have been incorporated in the court's findings of fact herein, are wholly incompetent, immaterial and irrelvant in the instant case. The entire object of the motion is to furnish a basis for argument that the contract in the instant case was a term contract — that is, a contract for a fixed and definite period of time and for a fixed and unchangeable rate of compensation for such period. Furthermore, claimant seeks thereby to avoid the effect of the authority of the Eastern Railroad case by an attempt to differentiate the facts therein from the facts in the instant case, although such difference, if it exists, is as to immaterial facts."

The facts were expressly admitted by the defendant's counsel in open court (See affidavit appended). But they argued orally, as in the brief, that the Court should not make any finding, however clear the facts might be, upon the point of a definite time, fixed by contract, for its duration. The court took this view when it denied claimant's motion for amendment of findings.

There was before the Court of Claims a report of the Postoffice Department to the Assistant Attorney General charged with the defense of the case, a report made

in the usual course of proceedings, which was duly authenticated; but in the preparation of this document the letter which we now seek to establish was omitted. There was submitted to the court, however, a copy of this letter which had been furnished by the Postoffice Department, but without authentication. No objection was taken on the Government's part to the form of that copy; counsel contenting themselves with the argument that the fact and the practice of sending such a notice had no relevancy to the issue presented.

Unless by means of this motion appellant is unable to put before this court the facts here recited upon which the findings of the Court of Claims are silent; the correspondence and the administrative practices of the Postoffice Department, it is assumed, not being within the judicial knowledge of the court.

The motion takes into account the informal character of the proof which was before the Court of Claims. The mandate sought would authorize that court at its discretion—previous admissions of the Government notwithstanding—to require, or to admit, other evidence if that which was submitted be not deemed conclusive.

BENJAMIN CARTER,
Attorney for Appellant.

F. CARTER POPE,
Of Counsel.

DISTRICT OF COLUMBIA, *ss:*

Before me, the undersigned, a Notary Public in and for the District of Columbia, personally appeared F. Carter Pope, who first being duly sworn, deposes and says:

I am of counsel for the claimant in the Court of Claims case of the Delaware, Lackawanna and Western Railroad Company, No. 30,364, and I was present and took

part in the argument of the same in said Court of Claims on both the original hearing and on the motion to amend the findings of fact made by the court. On the motion of claimant to amend said findings of fact a copy of the letter which appellant's foregoing motion, for a remand, seeks to establish was before the Court of Claims, and the representatives of the Government admitted in open court that said letter had been sent to the claimant, at or about the time of its date, in accordance with the established practice of the Department. The quotations in the brief on appellant's motion to remand from the briefs of counsel in the Court of Claims are true and correct. Beside said letter, and the practice in relation thereto, the Court of Claims was requested on appellant's part to find other facts which it did not include in the findings and which it is the purpose of appellant's counsel to present to the Supreme Court on the argument of the appeal, but those matters are deemed by counsel to be within the judicial knowledge of the court and therefore this motion is confined to the letter in question and said practice of the Postoffice Department.

F. CARTER POPE.

Subscribed and sworn to before me this 25th day of October, 1918.

[SEAL.] HENRY W. SAMSON,
Notary Public.

Notice of this motion, by serving a copy of the same, was given on the 6th day of November, 1918, to the Assistant Attorney General of the United States having charge of the defense of the case.

BENJAMIN CARTER,
Attorney for Appellant.

No. 158

Court of Claims of the United States.

No. 30364.

(Decided January 6, 1919.)

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, PLAINTIFF,

v.

THE UNITED STATES, DEFENDANT.

ADDITIONAL FINDINGS.

Upon the reply made by the Post Office Department, on December 23, 1918, to the call of this court for information relative to the following matters, the Court of Claims makes additional findings of facts in said case in compliance with the mandate of the Supreme Court as follows:

XI.

First. On February 8, 1905, the Post Office Department transmitted to the plaintiff and other companies, along with the distance circular set forth in Findings III and IV, a notice that the general superintendent Railway Mail Service, had been directed to weigh the mails, and used in so doing a circular form of letter of which the following is a copy:

2519.

POST OFFICE DEPARTMENT,
OFFICE OF THE SECOND ASSISTANT POSTMASTER GENERAL,
DIVISION OF RAILWAY ADJUSTMENTS,
Washington, D. C., February 8, 1905.

SIR: The general superintendent Railway Mail Service has been directed to weigh the mails carried on route No. —, between ——— and ———, for not less than thirty successive working days, commencing February 14, 1905, for the purpose of obtaining the data upon which the department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same) from July 1, 1905, to June 30, 1909.

The law requires that the weighing be done by sworn employees of the Post Office Department, and all Post Office Department employees will be instructed to take every precaution to secure correct weights, to provide against all irregularities, and to prevent any diversion of mails from their usual channels during said weighing.

This office, through the superintendent Railway Mail Service for the division in which your road is located, will advise your company

relative to the requirements of the department in connection with said weighing.

Very respectfully,

(Signed) G. F. STONE,
Acting Second Assistant Postmaster General.

XII.

The form of said circular letter was adopted in 1899 and was sent out each year thereafter to railroad companies concerned. The practice of sending notices of the weighings along with the distance circulars originated about 1886 and continued thereafter with one or two years' interruption. The forms of the circular notification letter varies in more or less material features between 1886 and 1899, when the form set forth in Finding XI was adopted.

OPINION.

CAMPBELL, *Chief Justice*, delivered the opinion of the court:

The court having been directed by order of the Supreme Court to make findings of fact relative to some matters not included in the findings heretofore made upon which the court's decision was based, additional findings have been made.

The rules of the court, as well as orderly procedure, are so frequently overlooked or ignored by parties that we take occasion to quote the rules, and because of the reasons assigned for the motion to remand this case the court feels justified in making a statement from the record of its course through this court. Assuming the importance, materiality, and existence of the matters concerning which we are directed to make findings of fact, the record will demonstrate why they were not included in the findings originally made. They were not requested to be found, nor was there any evidence to support them if they had been requested before trial or when the case was decided. Incorporated with plaintiff's motion for a new trial were certain questions designated a motion to amend the findings, and to these attention will be called.

The rules of the Supreme Court regulating appeals from, and governing the findings of fact in, the Court of Claims were promulgated at the December term, 1865 (3 Wall., p. vii; 3 C. Cls., p. xviii). Additional rules were promulgated in 1869 (rules 4 and 5, 9 Wall., p. vii), and a substitute for rule 5 was promulgated January 29, 1879 (97 U. S., p. ii). Rule 2 was materially changed in 1873 (17 Wall., xvii).

These rules now provide for a finding of the facts "established by the evidence in the nature of a special verdict, but not the evidence establishing them." The findings, together with the court's conclusion thereon, are to be filed, according to rule 4, in open court at or before the time judgment is entered. Rule 5, as promulgated in 1879, is as follows:

"In every such case, each party, *at such time before trial and in such form as the court may prescribe*, shall submit to it a request to find all the facts which the party considers proven and deems material to the due presentation of the case in the findings of facts." (Italics ours.)

To give effect to this rule this court prescribed the form and the time for filing the requests. Rule 73, promulgated January 1, 1916, contemplates their filing by plaintiff within 60 days after the completion of taking the testimony. Rule 74, promulgated many years ago, provides for their form as follows:

"Such request must be in the following terms: 'The claimant, considering the facts hereinafter set forth to be proven, and deeming them material to the due presentation of this case in the findings of fact, requests the court to find the same as follows.'"

It then prescribes that following this request must be a statement in the form of distinct, numbered propositions of the facts which the party desires to have found, so arranged as to present a concise statement, in orderly sequence, of the whole case as the party desires it to appear in the findings of fact, and subjoined to each proposition of fact shall be references to the pages of the record, or the unprinted evidence, relied on in its support.

The same rule applies to defendant's requests, and provision is made for objections by either party to requests by the other. The rules require requests for findings to be filed "before trial" and prescribe their form. Rule V of the Supreme Court contemplates their filing "before trial." Cases do not go upon the court's trial calendar until the requests and briefs of parties on both sides are filed, unless ordered to the calendar by the court.

The court's practice under Rule V and its own rules was stated in 1885 by Chief Justice Richardson in *Union Pac. Ry. Co. Case*, 20 C. Cls. 508, where the rules are considered. He says:

"The requests required to be submitted by the parties are for the assistance of the court in making up its finding and not for the purpose of obtaining specific rulings on each one separately in the form by them presented. The practice of the court is to give to the requests of the parties the fullest consideration and the most careful scrutiny, and, without finding or ruling upon each one, separately, to make up an accurate and connected finding, in its own language, in such way as to cover each material fact, asked for on either side, and to present to the Supreme Court on appeal a clear and concise statement of the case upon which questions of law may be there reviewed."

This practice has continued, and there is a recognition that the question of the materiality of a requested fact, established by the evidence, may not rest alone in this court's judgment. When upon the face of its findings it is stated, as uniformly is, that, "upon the evidence the court makes the following findings of facts," it is assumed that the facts found are those sustained by the evidence. As stated by Judge Richardson: "Facts alleged on the one side and the other which the court does not find to be established are omitted as not proved." (*Roche's Case*, 18 C. Cls. 289.) But motions to amend are allowable as provided for in the rules. (See *Lockwood case* 14 C. Cls. 648, 654) and they are granted where the party points to the evidence which the court on examination finds to have escaped its attention, or to have been omitted from its consideration. Formerly, such motions could come in at any time during the term at which the case was decided, and much delay occurred. The later rules seek to obviate such delays by requiring

motions to amend findings or for a new trial to be filed within 60 days from the date of judgment.

The court must be governed by the evidence, and the purpose in requiring references in the requests to where it is to be found in the record is to aid the court's investigation. If it were allowable for a plaintiff to rely upon defendant's mere request for a finding as an admission of the fact requested, the court would run counter to a rule, which it found necessary to announce years ago, to the effect that it would not be bound by admissions of representatives of the Government to its prejudice. (*Jones & Laughlin's Case*, 42 C. Cls. 178; *Campbell's Case*, 19 C. Cls. 426, 429.) The reason for the ruling is obvious, and it does not prevent proper stipulation by the Attorney General or the Assistant Attorney General, duly signed and filed, when deemed appropriate. Not long since the Assistant Attorney General was allowed to disaffirm and withdraw, as improvidently made, a stipulation entered into by an attorney in the Department of Justice.

Under the rules of the court and its decisions it is not difficult for parties to make requests for findings in accordance with the well-established practice. But these requests are frequently mere conclusions of fact or of law, intermixed with argument, find no support in the evidence adduced, and omit the references required by the rules. The present case is not exceptional as regards some of these objections.

Another objectionable course consists in omitting the form of request prescribed by rule 74 and asking the court to find "whether or not" stated propositions are true. This form has been criticised by the Supreme Court, and condemned by our own, as not complying with the purpose of the rule. (*Winton Case*, 52 C. Cls. 90, 100, and cases there cited.) In that case it was said by Judge Booth: "The purpose of a request for findings is to find the facts material and pertinent to the issue. It certainly can not be said to be equally pertinent and material whether the answer be in the affirmative or the negative, because if it be not a fact then its importance at once disappears."

In the instant case, in what the plaintiff called its motion to amend findings, the interrogative form, "whether or not," that was condemned in the Winton case, was used.

The history of this case, as shown by the record, may be thus stated:

The original petition was filed March 23, 1909. The plaintiff's request for findings and brief were filed in January, 1915, nearly six years after suit brought. The defendant consumed about nine months more before filing its requests and brief. The plaintiff then filed an amended petition, and shortly thereafter a reply brief, accompanied by a request for an additional finding involving a conclusion about seven years after suit brought. The case went from the general docket to the trial calendar, came on to be heard, and was argued by both sides May 26, 1916, and decided June 5, 1916. During the seven years of pendency of the case not a deposition of any witness was taken, not a particle of documentary evidence was filed by the plaintiff, nor did the plaintiff ask the court to issue a call upon the Post Office Department for information. In February, 1911, there was filed, by the defendant's attorney, a report

which the Post Office Department made to the Attorney General in response to his statutory call. Competent parts of such a report may be referred to, as evidence, under rules 61, 62, and 63. Material allegations of the petition were denied in an answer filed by defendant, and all of plaintiff's original requests for findings were objected to.

In no one of the plaintiff's original requests, or following it, was there any reference to evidence as required by rule 74. Before or at the hearing not a one of them referred to the "letter" mentioned in the motion to remand. It was not asked to be found. It was not in evidence or in the record. It was not referred to in any of the briefs. Nor was there any request for a finding that directly or remotely referred to the subject matter of the additional findings above mentioned, nor was it in any wise discussed in the briefs. The court's findings were necessarily based upon the report of the Post Office Department, filed by the defendant, and such facts as the court considered it could take judicial notice of, there being no other evidence offered.

Shortly after the decision, in June, 1916, the defendant filed a motion for a new trial, and plaintiff filed its "motion for amendment of findings of fact and for a new trial." These motions, coming in during the summer vacation, were sent to the calendar to be heard in October, and were then heard. The plaintiff did not use the form of request prescribed by rule 74, but moved "the court to amend the findings of fact filed herein on the 5th day of June, 1916, by finding whether or not," and this was followed by seven distinct propositions, none of which were supported by evidence, and the last of which was whether or not—

"G. In accordance with the long-standing practice of the Post Office Department in transmitting distance circulars, it wrote claimant on or about February 8, 1905, in substance and effect, that the department was about to weigh the mails on claimant's respective routes for the purpose of readjusting the compensation for the transportation of the same for the four years from July 1, 1905, to July 1, 1909, and inclosed therewith the distance circular, which claimant was requested to fill out and return to the department."

This proposition, brought into the record after the case had been heard and decided, is the first reference contained therein to the subject matter of the proposition itself. Manifestly the alleged letter, if in evidence, would not have furnished an answer to the query.

There was no reference to anything in the record to which the court could look if the request had been in proper form. There was nothing in the record to support an answer to the question. There was no motion to be allowed to introduce newly discovered testimony, for which the rules amply provide. When the motions came on to be heard in October, they were argued at length by both sides. No letter addressed to plaintiff was filed or presented. It is stated in plaintiff's brief, filed herein December 18, 1918, upon its motion for additional findings under the order of remand, that "after repeated verbal promises to counsel to report said letter in the instant case had failed of fruition, counsel requested of, and received from, the Post Office Department a copy of the form, and it was this letter which was referred to in claimant's motion for amendment of the findings."

As we have said, the case was then being heard upon motions for a new trial, and included in plaintiff's motion was that for amendment of findings by "finding whether or not." Amendments of findings are presumed to be based upon evidence in the record.

The court can not accept asseverations of counsel, as to facts, made in argument, whether denied or conceded by the other side at the bar, without any stipulation duly filed or other evidence, because of the rule to which we have referred, and because when hearing motions to amend findings, the court is not hearing new evidence not properly brought into the record. The motions having been overruled, appeals were taken to the Supreme Court, but subsequently defendant withdrew its appeal.

A considerable number of cases have been held on the docket without action because the court was told they were dependent on this case in the Supreme Court. The claimant's motion to remand the case was granted December 9, 1918. Upon the filing of the order, the case was set for a day certain. In the meantime plaintiff filed its requests to find facts in accordance with the directions of the Supreme Court and some additional findings. The parties appeared and were heard. No evidence was adduced. The plaintiff presented no motion for a call on the department. The matter could have been dismissed with the statement that there was no evidence upon which the court could respond or make the finding. But the language of the motion which was granted is that this court "find from the evidence now on its record, and any other competent evidence, whether or not" (1) a certain letter was sent, (2) whether or not it was sent in accordance with a long-standing practice.

The right of the Supreme Court to direct the finding of additional facts in a case, whether they are to be found in the record or involve additional proof, is undoubted. The court accordingly made its own call upon the Post Office Department, and the reply to that call furnishes the only evidence the record has ever contained upon the question involved. The additional findings are predicated upon that reply.

We have adverted to the rules for the purpose of impressing upon parties litigant the importance of conforming to them. It should be recognized that the conclusiveness, accorded by the rules and the decisions of the Supreme Court, to findings of this court (they being in the nature of a special verdict) places a grave responsibility upon this court, and upon parties as well, to have evidence in the record upon which to base them. Such evidence should be adduced "before trial." Under our rules it is only in exceptional cases, and as provided in the rules, that parties may expect an amendment of findings, or additional findings, based upon matters not found in the record when the case is tried. (*Lockwood Case*, 14 C. Cls. 648, affirmed by Supreme Court without opinion; *Union Pac. Ry. Co. Case*, 20 C. Cls. 508, 116 U. S. 154, 156; *McClure Case*, 116 U. S. 145.)

It is ordered that the clerk certify the foregoing additional findings and opinion as part of the record in this case.

Judge HAY, *Judge* DOWNEY, *Judge* BARNEY, and *Judge* BOOTH concur.

WASHINGTON : GOVERNMENT PRINTING OFFICE : 1919

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Supreme Court of the United States.

October Term, 1918

THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY
vs.
THE UNITED STATES.
No. 158.

BRIEF FOR APPELLANT.

BENJ. CARTER,
Attorney for Claimant.

F. CARTER POPE,
Of Counsel.

SUBJECT INDEX.

CASES CITED.

Supreme Court of the United States.

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THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY
vs.
THE UNITED STATES.
No. 158.

BRIEF FOR APPELLANT.

This appeal is taken from a decision of the Court of Claims relating to the power of the Postmaster General to fix rates of pay for transportation of the mails during two fiscal years (1907–1909) on two certain postal routes, Nos. 107108 and 109013, of which the average daily mails were of more than five thousand pounds weight; the effect of the decision being that claimant (appellant here) had no contract rights regarding the rates of compensation, but that those could be changed by the Postmaster General so as to apply reduced rates designated in the following provision of the postoffice appropriation act of March 2, 1907 (34 Stat. Chap. 2513, p. 1212, Record, p. 4):

> "The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, 1907, for the transportation of the mail on railroad routes carrying their whole length an average weight of mails per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mails on such routes, and hereafter

> the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than 5,000 pounds and less than 48,000 pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds."

In holding as above stated the Court of Claims, because it had not met the views, or the convenience, of the Postmaster General to issue an order putting the act of 1907 into effect until September 12, 1907, gave claimant judgment for the deductions made from its compensation at the old rates for the period between July 1 and September 12. From the judgment both parties appealed, the Government subsequently withdrawing its appeal.

STATEMENT.

In the spring of 1905 claimant was engaged in transporting the mails on the two routes in question here under readjustment of its pay made in 1901, effective July 1, 1901, and running to June 30, 1905. On February 8, 1905, the Postmaster General, in accordance with custom, sent to claimant a letter in which he stated that the General Superintendent of the Railway Mail Service was about to weigh the mails on these two routes "for the purpose of obtaining the data upon which the Department may adjust the pay for mail service on the route (in accordance with the several acts of Congress governing the same) from July 1, 1905, to June 30, 1909." (Additional Finding XI, Supplemental Record, p. 1.)

Along with said letter there was sent a distance circular in form such as that the railroad company might insert thereon the distances between the stations on its line together with other information, and this cir-

cular, which claimant was requested to execute and return as soon as practicable (Record, foot of p. 9), contained what, in Departmental parlance, was known as an "agreement clause," as follows:

> "In case the Postoffice Department authorizes the transportation of mails over this line or any part of it, the railroad company agrees to accept and perform this service upon the conditions prescribed by law and the regulations of the department."

This distance circular, as to each route, was duly executed by claimant's proper officers and returned to the Department.

On July 1, 1905, under authority of claimant's acceptance of the proposition tendered by the Postmaster General, the United States mails were put on claimant's trains and transported as theretofore. In the meantime, the weighings had been completed (Record, p. 13) but the calculations of claimant's pay had not been made by the Postmaster General. After the calculations of claimant's pay had been made, the Postmaster General, in September, 1905, in accordance with custom, issued an order, the original of which was sent to the Auditor for the Postoffice Department and a copy to claimant, with a notice; which order was as follows:

"ORDER

"RAILROAD SERVICE.

"B-5168 107108 N. Y., Hoboken, N. J. and Buffalo, 410.23 miles, 55.03 t. a. w. [times a week] Delaware, Lackawanna & Western Railroad Company, a. d. w. [average daily weight] 20,718 lbs.

"From July 1, 1905, to June 30, 1909, pay the Delaware, Lackawanna & Western Railroad Com-

pany, quarterly, for the transportation of the mails between Hoboken, N. J., and Buffalo, N. Y., at the rate of $138,895.67 per annum, being $338.58 per mile for 410.23 miles, and for R. P. O. car service at the rate of $20,511.50 per annum, being $50.00 per mile per annum for 410.23 miles for 1 line of 60-foot cars between Hoboken and Buffalo.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week."

The notice, addressed directly to claimant, read:

"Sir:—The compensation for the transportation of mails, etc. on Route No. 107108 between Hoboken and Buffalo, has been fixed *from July 1, 1905, to June 30, 1909, under acts of March 3, 1873, July 12, 1876, and June 17, 1878*, upon returns showing the amount and character of the service for 78 successive working days, commencing February 14, 1905, at the rate of $138,895.67 per annum, being $338.58 per mile for 410.23 miles, and pay is allowed for use of R. P. O. cars from July 1, 1905, to June 30, 1909, at the rate of $20,511.50 per annum, being $50.00 per mile for 410.23 miles for 1 line 60-ft. cars between Hoboken and Buffalo.

"This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week." (Italics ours.)

On receipt of a Treasury warrant for one quarter's pay, computed in accordance with the above order, claimant's Assistant Treasurer, under date of October 16, 1907, wrote a letter to the Postmaster General saying that the warrant was received under protest and objecting to the reduction made. The Postmaster General on October 19, 1907, replied, asserting that the reductions of compensation in question were au-

Insert, just before last paragraph on page 4 of appellant's brief, *D. L. & W. R. R. Co.* v. *United States*, No. 158, October Term, 1918.

Claimant was paid in accordance with the foregoing order and notice to July 1, 1907. On September 12, 1907, after the passage of the act of March 2, 1907, the Postmaster General issued his orders, B-19700 and B-19710, reducing the pay, from the preceding July 1, on each of the routes in question by 5 per cent of the amounts previously paid on the weights in excess of 5,000 pounds, as those weights had been ascertained in 1905. The first deduction was made from the pay of the quarter ending September 30, 1907, and similar deductions were regularly made thereafter until a new contract was entered into taking effect July 1, 1909, the total of such deductions being the sum of $6,976.12 (Rec. pp. 16–18).

thorized by law. Other correspondence ensued terminating with a letter in which the Postmaster General, addressing claimant's General Counsel, said:

> "The service may be continued by you, but it must be with the distinct understanding that there is no agreement on the part of the department to pay for the same at a higher rate than that fixed by the readjusting order issued in accordance with the act above referred to. There is no objection however, to your reserving any legal right which you may have under the contract existing prior to July 1, 1907, and resorting to legal procedure for the determination of the same if you choose to do so."
>
> (Rec. pp. 18–23.)

ASSIGNMENT OF ERROR.

Errors are assigned hereby as follows:

(1) The Court of Claims erred in holding that the legislation of March 2, 1907, reducing compensation for transportation of the mails, was lawfully applicable, during the four-years contract period 1905–1909, to weights of mail carried by appellant in the spring of 1905, before the commencing of said period.

(2) The Court of Claims erred in not entering judgment in claimant's favor for the amount of the reduction effected in its compensation for the entire contract period, 1905–1909, by the application of said legislation of March 2, 1907.

PROPOSITIONS.

(1) Correspondence between the parties in 1905 before July 1, together with the laws, created contracts for transportation of the mails by claimant for a term of four years commencing July 1, 1905, for the rates

of compensation then established by law, subject only to the right of the Postmaster General, at his discretion, to discontinue the service or curtail the routes.

Chicago & Northwestern Ry. Co. v. *United States*, 104 U. S. 680.

Chicago, Milwaukee & St. Paul Ry. Co. v. *United States*, 104 U. S. 687.

Eastern Railroad Co. v. *United States*, 129 U. S. 391.

(2) Congress could not during the term of said contracts change the rates of compensation due thereunder to claimant; and the act of Congress of March 2, 1907, reducing compensation, should be interpreted so as not to have this effect.

Knight Templar and Indemnity Co. v. *Jarman*, 187 U. S. 197, 205.

Harriman v. *Interstate Commerce Commission*, 211 U. S. 407, 422.

United States v. *Delaware & Hudson Co.* 213 U. S. 366, 407, 408.

Lincoln v. *United States*, 202 U. S. 484, 498.

(3) When an act of Congress fixes compensation for service to be performed, or the method of determining the same, the United States are lawfully bound to pay the one who performs that service the identical compensation so fixed or so determinable, any order or act of a superior officer of the Government to the contrary notwithstanding.

Goldsborough v. *United States*, Taney's decisions, 80.

United States v. *Symonds*, 120 U. S. 46.

Glavey v. *United States*, 120 U. S. 595.

Andrews v. *United States*, 240 U. S. 90.

James H. Cochnower v. *United States*, not officially reported.

(4) Laws or regulations entering into, or governing, a contract are presumed to be those alone which exist at the time of the contracting.

Connecticut Mutual Life Insurance Co. v. *Cushman*, 108 U. S. 51, 65.
Walker v. *Whitehead*, 16 Wallace, 314, 317.
Von Hoffman v. *City of Quincy*, 4 Wallace, 535, 550, 551, 554, 555.

(5) A so-called "regulation" made by an executive officer of the Government, when it undertakes to do what the law does not authorize, has no validity.

Morill v. *Jones*, 106 U. S. 466, 467.
Steinmetz v. *Allen*, 192 U. S. 543, 561.
United States v. *United Verde Copper Co.* 196 U. S. 207.
Williamson v. *United States*, 207 U. S. 425, 462.

(6) The Postmaster General had no discretion by which to impose upon claimant for service performed under its 1905–1909 contract any less rates than those which were established by law at the time of the contracting.

United States v. *McDaniel*, 7 Peters 1, 13.
Chicago & Northwestern Ry. Co. v. *United States*, and *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States, sup.*

ARGUMENT.

The New Rates Did Not Apply Except to New Weights.

For convenience, the second question raised by the assignment of error will first be discussed briefly.

The departmental orders issued in 1907 show that the routes were treated as having the same average

daily weights as were shown in the orders issued in 1905, and the same thing is to be inferred from Finding IX (Rec. p. 23).

With respect to the contention made in the petition, Paragraph VI, and covered by this assignment of error, the opinion of the Court of Claims says:

> "It is, however, insisted by plaintiff that if the act of 1907 could be put into effect upon plaintiff's road at all, the mails should first have been re-weighed. We think it clear that the Department had a right to re-weigh the mails, but it did not do so, nor did plaintiff demand that it should. * * * We fail to see how the fact that the mails were not re-weighed affects the plaintiff's case."

Then the court goes on to treat the act of 1907 as substantially identical with the acts of 1876 and 1878, which, in the Eastern Railroad Company's case, 129 U. S. 391, 20 Ct. Cls. 23, it was held the Postmaster General had the right to apply in the contractual relations there shown to have existed.

The fact is—and this seems to have been overlooked—that a demand by the present claimant for a re-weighing of the mails would have involved an abandonment of its position, which it was sturdily insisting upon, that it had a time contract. Moreover, if the act of 1907 implied the necessity of re-weighing as a condition precedent to its application, it was not incumbent upon claimant to demand that the Postmaster General proceed to re-weigh; he should have done that of his own motion.

The acts of 1876 and 1878, which were held to apply only to railroads not under contract with the Postmaster General, but performing services which they might discontinue at any time, made flat percentage

reductions on all routes. The act of June 17, 1878 (20 Stats. L. Ch. 259, p. 142), provided:

> "The Postmaster General is hereby authorized and directed to readjust the compensation to be paid for and after the first day of July, 1878, for transportation of mails on railroad routes by reducing the compensation to all railroad companies for the transportation of mails, five per centum from the rates"

fixed by the acts of 1873 and 1876; while the act of 1907, reducing the rates on all routes carrying over 5,000 pounds per day, contemplated also an ascertainment of the weight to which the reduced rates should be applied. It said:

> "On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds."

The very terms of this act made it the duty of the Postmaster General to pay 95 per cent of the previous rates on weights above 5,000 pounds carried at the time of putting the act into effect—not on the weights ascertained at some previous time. How was the Postmaster General to do this without re-weighing the mails?

It is submitted that, acting with no regard to weights of 1907, the Postmaster General did not lawfully execute the act of 1907; that it was imperative on him to maintain the *status quo*, paying claimant in accordance with the only contract to which it had ever agreed.

Claimant's Contracts Were Invaded.

The Court of Claims has held that no effect whatever is to be given to the long-standing practices of the parties nor to the communications passing between them at the time of the contract, or readjustment (whatever it may be called) in 1905, and that because claimant performed service after receiving the order and notice in 1905 containing the stipulation "subject to future orders," it had bound itself to submit to any order which the Postmaster General might make affecting its compensation.

Claimant's contention is that in 1905 it had executed what both parties understood to be a four-years contract, and that the stipulation in the order and notices of adjustment was not intended to modify or annul this contract, but referred to the administrative orders of familiar tenor which were provided for by the law and the regulations, to meet such changes as might occur in the quantum of service and which therefore were within the contract.

Such orders, within the contract, based on the laws and the regulations, that the Postmaster General might issue affecting the compensation of railroads, were numerous. A few among them were:

1. For frauds or mistakes in the weighing.
2. For mistakes in the department's mathematical calculations.
3. For curtailment of the route.
4. For extension of the route.
5. For abolishment of the route.
6. For the institution, discontinuance or change in the Railway Postoffice Car Service.

It would have been a very foolish thing for the

Delaware, Lackawanna & Western railroad, or for any other railroad company (all of them did the same thing), to accept in silence a suggestion from the Postmaster General that the adjustment of pay for four years on the terms the laws specifically named was to be subject to the future orders of the Postmaster General without some understanding as to what these future orders might embrace. Every presumption ought to be against such a thing. The construction given by the Court of Claims to this statement in the notice of adjustment means that regularly, each year for over twenty years, the parties agreed that the new contract was to run for four years on the terms then provided by law, and then, a few months later, turned around and agreed that, instead, the company was to perform service and accept compensation therefor according to any unlimited and undefined orders of the Postmaster General.

Such a construction, it is submitted, is contrary to sound reason; and moreover, it is contrary to the construction for many years given to the relationship by the parties themselves. On this latter point the expressions of the Postoffice Department since the institution of the agreement clause on the distance circulars in 1884 are clear.

The position of claimant is that, having executed the instrument tendered it by the Postmaster General with the representation that it was to be effective the first of the following July and to run for four years, it had a term contract which could not be altered without its consent; that, while such changes might be made as were provided for in the laws and regulations then existing (being of the substance of the contract), no other changes could be imposed by fiat of the Postmaster General.

But if in executing the thing tendered it by the Postmaster General claimant gave him an option, he exercised that option when, after midnight of June 30th, 1905, he caused the mails to be put on claimant's cars. He then and there bound the Government to the same terms which he had offered and he bound claimant to none other. A contract was closed upon the stipulation proposed by the Postmaster General that it was to run for four years; the rights of the parties to be determined by the laws and regulations in force when they entered into the contract. The agreement clause was precisely the same as if it had specified that the performance of service was to be "upon the conditions NOW prescribed by law and the regulations of the Department."

It had seemed to be settled that when parties contract with reference to, and incorporate into their contracts, the laws (and regulations), they are presumed to have in contemplation the existing laws and regulations, and not some future laws or regulations.

Conn. Mut. Life Ins. Co. v. *Cushman*, 108 U. S. 51, 65.

Walker v. *Whitehead*, 16 Wallace, 314, 317.

Von Hoffman v. *City of Quincy*, 4 Wallace, 535, 550, 551, 554, 555.

But however this may be, the Delaware, Lackawanna & Western Railroad Company, in signing the agreements of 1905, did not bind itself to anything thereafter done by the Postmaster General (though in the guise of a regulation) which exceeded his lawful authority.

Morrill v. *Jones*, 106 U. S. 466, 467.

Steinmetz v. *Allen*, 192 U. S. 543, 561.

United States v. *United Verde Copper Co.* 196 U. S. 207.

Williamson v. *United States*, 207 U. S. 425, 462.

So claimant insists, unless there was something in the laws and regulations, by which the parties had agreed to be bound, permitting the Postmaster General to vary the compensation for the performance of the identical service contracted for in the beginning, the order of September, 1907, was unlawful, and the Postmaster General had no lawful right to put the reductions into effect until the expiration of the contract term and the signing of a new agreement.

Chicago & Northwestern Ry. Co. v. *United States*, 104 U. S. 680.

Chicago, Milwaukee & St. Paul Ry. Co. v. *United States*, 104 U. S. 687.

Not only was there no such provision of law and no such regulation; no such right had ever even been claimed by the Postoffice Department.

The view here taken regarding the meaning of the law of 1907—the intention with which Congress enacted it—is to be preferred by the courts because upon a contrary interpretation it would be invalid, or, at least, a serious constitutional question would arise.

Knight Templar and Indemnity Co. v. *Jarman*, 187 U. S. 197, 205.

Harriman v. *Interstate Commerce Commission*, 211 U. S. 407, 422.

United States v. *Delaware and Hudson Co.* 213 U. S. 366, 407, 408.

Lincoln v. *United States*, 202 U. S. 484, 498, discussed in *United States* v. *Heinzen*, 206 U. S. 370, 390.

Congress itself, obviously, had not the power to set up arbitrarily, midway of a contract, different rates of compensation from those contracted for or to change the contract in any other respect.

Misapprehension might arise from the method adopted by the Court of Claims in introducing Section 1253 of the Postal Laws and Regulations of 1902, in which it is provided that "The United States shall be divided into four contract sections. A general letting for one of these sections will occur every year, and contracts will be made for four consecutive years, commencing on the first day of July." (Record, p. 24.) The Court of Claims evidently was of the impression that this applied only to steamboat and star routes, where there was advertisement for proposals. In fact, a similar paragraph was in the Regulations, Edition of 1887, as Paragraph 774. The Chapter on Railroad Transportation in the Regulations for 1887 began with Section 741, literally quoting Section 3942 of the Revised Statutes as follows:

> "The Postmaster General may enter into contracts for carrying the mail, with railway companies, without advertising for bids therefor."

And that was followed immediately by this note:

> "The postoffice regulations establishing contract sections relate to the whole mail service. They do not compel the Postmaster General to make time contracts with the railway companies, nor prevent him from accepting service which may be determined at will by either party."

Under the first section (1162) of the Regulations of 1902, relating to Transportation of Mails by Railroads, appears the following note:

> "Under Chapter 7, this Title, 'Transportation of mails on steamship, steamboat and star routes,' will be found certain statutes which apply to transportation of the mails generally."

Similar notes appear to Sections 1205 and 1230 relating to transportation by still other means—the idea sought to be conveyed throughout being that there were certain general provisions which, for convenience, and, doubtless, to save repetition, were carried in Chapter 7.

What is here asserted for claimant is, not that the Postmaster General was compelled to contract for four years with railroad companies, but that he had the right to do so, and, in this particular case, exercised that right.

The Law Fixed the Terms of the Contract.

By consulting certain facts of record which the Court of Claims would not consent to put into its findings this court will learn that the modern distance circular—that is, the one containing the agreement clause and differing in that respect from the one used in the Eastern Railroad case—was a solution of differences and disputes theretofore prevailing, and, in fact, and by understanding of both parties, established a statutory contract of four years duration.

The act of March 3, 1873 (17 Stats. L. Ch. 558), fixing rates for railway mail service, insofar as material to this case, provided as follows:

> "The Postmaster General be, and he is hereby, authorized and directed to readjust the compensation hereafter to be paid for the transportation of mails on railroad routes upon the conditions and at the rates hereinafter mentioned, to-wit: That the mails shall be conveyed with due frequency and speed; * * * and that the pay per mile per annum shall not exceed the following rates, namely: On routes carrying their whole length an average weight of mails per day of * * * pounds, * * * dollars, the average weight to be ascertained, in every case, by the

> actual weighing of the mails for such a number of successive working days, not less than thirty, at such times, after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years, and the result to be stated and verified in such form and manner as the Postmaster General may direct."

This enactment was carried into the Revised Statutes as of December 31, 1873, becoming Section 4002 thereof. It repealed certain provisions of the Postoffice codification act of June 8, 1872. (Opinions of Assistant Attorney General for the Postoffice Department, Vol. 1, p. 63.) The new law, however, had not come into general operation in that little time and, therefore, the other provisions also were retained in the Revised Statutes, being Sections 3997 and 3998. The elder law and the new law were carried along in the Postal Regulations, until the latter had been applied generally, whereupon, in the compilation of 1879, they were dropped out.

The path of the Postmaster General in synthesizing the finances of the railway mail service—in putting carriers uniformly on a basis of contract—was not an easy one. The railroad managers were not content with the rates of pay fixed by the laws of 1876 and 1878 and were hoping for amelioration; wherefore they were not willing to bind themselves by contract for any definite periods to the existing rates. In his report for 1876 (p. 19), the Postmaster General observed:

> "Less than one-fifth of the railroad service of the country has been, as a general rule, covered by written contracts, and innumerable complaints, misconstructions and difficulties have grown out of this loose way of doing business which annually amounts to millions of dollars."

In his report for 1878, the Second Assistant Post-

master General, before discussing a proposed new law advocated by the commission appointed under the act of 1876, adverted again to the differences of opinion and lack of concord concerning the rates of compensation and the practices of the department, saying:

> "The abatement of 5 per centum in the compensation of railroad companies for conveying mails from July 1, 1878, has been the occasion of much complaint and dissatisfaction. (p. 59.)
>
> The greater number of leading companies have entered formal protest against this reduction, and claim that there should be a decrease in service corresponding to the reduction in pay; and some of the companies have expressed a desire to be relieved of the postal service altogether, asserting that they continued to perform the service temporarily for the sole reason that their refusal to do so would entail great inconvenience and loss to the business men located on their respective lines. * * *
>
> "The inadequacy of the present pay on short routes is again mentioned, for the reason that frequent protests have been received, and statements made showing that the compensation received for all service rendered was not as much as a reasonable compensation for the delivery of mails from stations to post-offices would amount to. A service performed without specific compensation is and must always be a fruitful source of dissatisfaction and controversy." (p. 60.)

On page 58 of his report the Second Assistant Postmaster General referred to the fact that numerous cases arose every year in which it was necessary to reweigh the mails—as was done in the Eastern Railroad case.

It is an historical fact of interest that during these times railroad companies not under time contracts would

call on the Postmaster General for frequent re-weighings, either on the plea of justice or under the threat to quit. On the Eastern Railroad's principal routes there was a re-weighing which resulted in a substantial increase of compensation notwithstanding the reduction of the act of 1878. Moreover, in many instances the railroads were able, under Section 3999, to obtain rates in excess of the rates named in the statutes strictly for railway mail pay, and this practice continued until stopped by an opinion of the Assistant Attorney General for the Postoffice Department on March 6, 1879, this construction being thenceforward carried into the Postal Laws and Regulations, commencing with Sec. 645 of the Edition of 1879.

This opinion, addressed to the Second Assistant (Vol. 1, p. 398), is as follows:

> "It is very true that, notwithstanding a refusal of the company to carry the mail at the rate prescribed by law it could still afford to carry it much cheaper than any private individual. But a construction of this character would result in a refusal of all the companies to carry for the compensation fixed by law, thus compelling the Department to advertise, in which case the superior facilities of railroad companies would defy competition, thus compelling the Government to pay an enormously high rate of compensation for the service.
>
> "I am of opinion, therefore, that it is competent for the Department, in case of a refusal of a railroad company to carry the mails at the rate prescribed by law, to contract for carrying said mails by other modes and to prescribe in the contract the particular mode by which the mails are to be carried, and that the mode prescribed shall be other than by railroad. If such is not the true construction then it is evident that the act fixing

> the rate of compensation to be paid to railroad companies for mail service amounts to nothing."

What the Postmaster General had offered to each railroad company was a contract for a specified time at the statutory rates of pay. (See *Chicago & Northwestern Railroad Co. and Chicago, Milwaukee & St. Paul Railroad Co.* cases, *supra*, where this court denied the right of the Postmaster General to apply to subsisting contracts of four years' tenure reductions under the act of 1878.)

In January, 1876, the Chicago, Burlington & Quincy Railroad Company declined to sign such a contract at the rates named. Afterward when its compensation was subjected to the reduction provided in the act of 1876, it made claim for the amount withheld, but the Assistant Attorney General for the Postoffice Department held that it had made its bed when it refused to enter into a time contract and it must lie there (Opinions, Vol. 1, p. 339). This rule was thereafter applied generally to the railroads and its principles were upheld later in the Eastern Railroad case.

Thus it appears there had grown up two kinds of service, one by definite contract, and the other called "recognized" service with no undertaking by the railroad company to continue it for any fixed time.

Mixed all along with the question of pay was that of the transfer of the mails between postoffice and railroad stations, "side service" in postoffice parlance. The railroad companies insisted that this duty should not be imposed upon them without special compensation. In the report of 1879 (p. 52), the Postmaster General said:

> "In the report for 1878 the question of compensation for service on short routes and the delivery

> of mails from stations to postoffices were presented as proper subjects for the consideration of Congress, and reference is again made to these questions because they stand in the way of the equitable adjustment of the compensation to railroad companies for carrying the mails."

The Postmaster General's report for 1880 gave the railroad companies some ground to hope for better compensation. Referring to the legislation of 1876 and 1878, it said:

> "The net reduction of railroad rates (other than land-grant) by the two acts to which reference has been made is 14½ per cent of the rates allowable under the act of March 3, 1873. These reductions were made when the cost of labor and the material used in the construction of railroads was at its lowest point and was properly in the matter of remuneration, in a line with all other business transacted by railroad companies. These circumstances are now entirely changed, and it would be an impossibility to maintain the present high state of efficiency in the transportation of the mails on the important lines if the pay was restricted to the rates of compensation fixed during the period of business depression (pp. 74–5)."

Naturally, when hoping for better conditions, the railroad managers were not disposed to contract for continuance of the same rates of pay and for unpaid performance of the side service. It was not long, however, before different conditions arose, which were a sufficient reason for a change of railroad attitude.

On March 1, 1881, Congress had passed the act (21 Stats. L. Ch. 96, p. 375) providing a ten per cent reduction in pay for railroad companies which refused to furnish certain facilities required by the department, and on March 3, 1883, the act (22 Stats. L. Ch. 92, pp. 454,

455) providing a fifty per cent reduction for the companies refusing to carry the mails on their fastest trains, and providing also for another investigation (p. 455) and report by the following December on the general subject of the railway mail pay. The report of the commission appointed under this act was accompanied by a bill to make radical changes in the system, which confessedly would have had the effect of reducing the pay. This bill never became a law, but its enactment was urged and the railroads were threatened with it. (Report of Postmaster General for 1884, p. 104.) There was good reason why the railroad companies should now be willing to enter into time contracts on terms which were known rather than to take chances on adverse legislation. Not only had Congress failed to restore the reductions of 1876 and 1878, but every time it enacted anything at all it was harmful. From the standpoint of the railroad companies it was better to be secure in the possession for a definite time of something certain. Then, from the standpoint of the Postmaster General, it was better to have the service definitely provided for rather than to remain in a constant state of uncertainty.

Naturally enough the departmental reports of the years following do not speak of any recusance of railroad companies. Controversy gave way to this understanding: that the railroads would carry the mails for terms of four years from each readjustment, receive the pay allowed by the law and submit to the Postmaster General's administration of the contract under the terms and restrictions imposed by law, and the Postmaster General would make the readjustments for terms of four years. It was agreed the administration should be according to law, and, if in the opinion of the railroad company there were any breach in

the agreement on his part, the railroad company might have its legal remedy.

This has been the common understanding of the parties ever since, and until the defense of this suit no other claim had ever been made. On the contrary, the relationship was frequently, publicly and notoriously described as a term contract by the Postmaster General, and nobody ever thought of it as anything else.

Pursuant to this general understanding, the Postmaster General, beginning in 1884, instead of sending the railroads the old form of distance circular and following it up with a special contract after the compensation had been calculated, wrote the railroads the form letter stating his purpose to readjust the compensation for the "term commencing July 1, 18—," which finally became "from July 1, 1899, to June 30, 1903," etc. (Supplemental record, p. 1), and he amended the distance circular by adding thereto the agreement clause substantially as it appears on the circulars proved in this case.

Certainly some change in the relationship was created by the amendment to the distance circulars. The parties' understanding of their new relations should have its weight in the decision of this case. That relationship could hardly be a subject of doubt, but if it were, the course of dealing between the parties for a long series of years, with absolutely no differences of opinion about it, should be conclusive.

In 1886 we find the Second Assistant accounting for an unexpected saving, as compared with the estimates of the preceding report, in the railway mail pay as follows (Report, p. 181):

"The explanation of this reduction, it is con-

> fidently believed, is to be found * * * in the fact that during the past fiscal year there were no special weighings outside of the regular quadrennial weighings, although numerous applications were made for such weighings, which were declined, the department not perceiving their justice or necessity. These special weighings necessarily result in an increase of cost."

By what right, regardless of the department's conception of the lack of justice or necessity for the special weighings—theretofore allowed—could the department deny these except upon the theory that there existed a time contract, based on the results of "the regular quadrennial weighings"? If the railroads then were not under time contracts and could cease the service at any time, the Postmaster General would have had to re-weigh their mails as a condition to the continuance of their service, because the weight of the mails was the only basis upon which he could pay.

The next year the Postmaster General was a little more explicit in stating his conception of the relationship. He said (Report, p. 400):

> "The present system of pay is liable also to another objection, and that is its want of a proper and equitable adjustment for the service performed between the department and the railroads engaged in the performance. To illustrate both these objections, I will state that, under the existing law a weighing takes place on every railroad in the United States once in every four years, and on the weight thus ascertained the pay of the road is fixed for four years ensuing from the first of July after such weighing. Now, the exigencies of the service are constantly requiring changes in the distribution of the mails, and it may, as it often does, happen that the weights thus ascertained may very largely increase or di-

minish at any time during this period of four years. When this takes place, as it frequently does, the department is under the necessity of reweighing the mails on the routes thus increased or diminished, at a very large cost, as the weighing must take place for 30 consecutive days over the routes thus affected by the change in distribution. Many such instances occurred during the last year."

In 1907 the Second Assistant Postmaster General revived this subject and, having given explanations similar to the above, he made this specific recommendation (p. 175):

> "*Second.* That authority of law be secured permitting the readjustment of compensation for railroad mail service during the term, when the diversions made materially affect the average daily weights." (Report, p. 176.)

Thus it was definitely recognized and proclaimed by the Postoffice Department as late as for the fiscal year ended June 30, 1907, that for the performance of the identical service from the beginning to the end of the contract term, the pay of the railroads could not be impinged upon.

In the report for 1906, when speaking of an unexpectedly large increase in the fourth contract section, and its effect on his estimates, made the preceding year, the Second Assistant Postmaster General said (p. 169):

> "As the pay for this section last adjusted will continue for four years from July 1, 1906, it, of course, will affect not only the appropriation for the current fiscal year but our estimate for the next fiscal year." (Report of Postmaster General for 1906.)

The report for the year ending June 30, 1906, was

written after the contracts involved in this case were entered into. It was written the next year before a new law (of March 2, 1907) came to the Postmaster General for administration, when he took a new position.

Contemporaneously and continuously from 1886 down to and including 1906, every public pronouncement of the Postmaster General was consistent with the one theory—that expressed in his letter transmitting the distance circular—that the relation was to be one of a statutory contract of four years duration. No railroad company had room or right to think otherwise than that, when it executed the document tendered it by the Postmaster General, it was entering into a relationship of that kind.

Following constant references in the reports (1888, p. 118; 1889, p. 243; 1890, p. 264; 1891, p. 337) to adjustments for "four years" the Second Assistant Postmaster General in 1893 (p. 144) said:

> "The most important item of increase in the railroad transportation is that resulting from the quadrennial readjustment of pay on the basis of the weight of mail carried. Whenever the reweighing shows a large increase in weight the compensation of the railroad is increased by the operation of the statute. It is not a matter within the control of the department" (p. 144).

In 1894 (p. 171), 1895 (p. 164), and 1896 (p. 214), the same officer spoke of the railway mail pay as fixed, in the several contract sections concerned, for the four years ensuing.

Before the Wolcott Commission in 1898, Second Assistant Postmaster General Shallenberger stated, in the following colloquy, the department's conception of the relationship existing with the railroads:

Senator Faulkner. Then, although you enter into a contract for four years now, the service may be immensely increased and the burden imposed on the road increased under that same contract?

Mr. Shallenberger. Written contracts are not made with railroad companies. We simply state the service upon a route. If it be a new road and we desire it to serve the terminal and intermediate offices, we state the service.

Senator Allison. The law and the regulations fix the method of operation.

Mr. Shallenberger. Yes. Now with regard to weighing, weighing occurs in the four sections of the country successively—one weighing each year—and that weighing fixes the compensation of the road for four years, regardless of the increase and regardless of the diversion of mail that we find it necessary to make to that road from any other road.

Senator Faulkner. And regardless of the increase of service you may require during the four years?

Mr. Shallenberger. Yes; or of the increased expedition of trains or for any other reason. All must be performed at the compensation fixed at the beginning of the four year period.

(Postal Service Investigation, 56 Cong. 2d Sess. Vol. 2, p. 735.)

The report for 1901 contains an expression which had grown to be quite common, viz.:

> "The annual rate of expenditure for railroad transportation in the first contract section was," etc. (p. 326).

Places where equivalent expressions occur in the Postmaster General's reports for the succeeding years are: 1902, p. 193; 1903, p. 138; 1904, pp. 133–134; 1905, p. 193 and 1906, p. 168.

The sections were constantly spoken of as the "contract sections," the terms as "contract terms," and the duration of the readjustments as for "the ensuing four years."

Wherever, in any source of public information known to counsel, there has been any expression whatsoever by the Postmaster General as to the duration of the contract with the railroads it has been all to the same effect—viz., four years. There has not been found anything, anywhere, to the contrary.

It remains to make clear the radical difference between the Eastern Railroad Company's case, from which the Court of Claims makes liberal quotations, and the present case. The Eastern Railroad Company did not have a time contract. It could have had such a contract if it had wanted it; but for reasons which seemed to it sufficient it preferred to perform the service under the orders of the Postmaster General, taking its chances on the course of events; it signed nothing upon which it could base the claim that there was any agreement upon anything in particular, and, taking advantage of one of the conditions which doubtless had influenced it not to desire a time contract, it demanded and obtained re-weighings on its principal routes and received a consequent large increase in pay—itself negativing the theory of a time contract.

The Court of Claims to the contrary notwithstanding, it is submitted that the agreement between the parties was complete when it was signed and returned to the Second Assistant Postmaster General, and nothing remained on either side but performance, at least from the time when the mails were put on claimant's trains following the expiration of its previous term, on June 30, 1905; that certainly that action by the Department was ample "to convert the conditional ex-

pression by the plaintiff into an actual undertaking"; also that the "endorsement" on the distance circular did bind the claimant to transport the mails at a certain price—the price fixed by law.

By refusing to recognize the acceptance by the Postmaster General of claimant's executed distance circular as a consummation of the contract, the Court of Claims evidently means to hold that it was necessary for the Postmaster General not only to institute the service but also to write the claimant that "I accept your acceptance of my proposition." But in the recent case of the *United States Fidelity & Guaranty Co.* v. *Riefler*, 230 U. S. 17, this court held that, a surety company having furnished its indemnitors with the bonds to be signed by them and they having done this and caused the executed bonds to be returned to the surety company, no further communication from the company was necessary to fix their liability. This rule is certainly the only one consistent with reason. (See also, *Chicago, Milwaukee & St. Paul Ry. Co.* v. *United States*, 244 U. S. 351, *et seq.*

It is submitted also, as perfectly clear, that the contemplation of the parties was not that that the arrangement completed in 1905 would "probably" continue for four years at the stated compensation, but that it certainly would; and that the "future orders" to which that compensation might be subject included only those provided for by the existing laws and regulations, which did not make provision for such an order as was issued in September, 1907. The decision of the Court of Claims gives to the form of contract at issue an effect directly opposite to that which had been given to it by both parties for more than twenty years.

The Postmaster General Had No Discretion to Fix Rates.

If it were suspected that the Postmaster General had an undefined discretionary power by which at any time he might have paid for the railway mail service less rates than those established by the laws, the idea would find a clear negation in the records of Congress and the Postoffice Department.

It might be demonstrated that a chief purpose of the act of 1873 was to take away from the Postmaster General such discretion in this regard as theretofore he had been exercising. That, however, is an idle inquiry; for in 1873, 1874 and 1875 he actually had fixed the pay of each mail route by the figures set up in that law; and in 1876, 1878 and in 1907 Congress recognized the rates, as established and invariable, when it made specific deductions therefrom. In 1876 it could be observed that the law of 1873 was giving to the mail routes from $50.00 per mile per annum to something like $1,500.00. Congress was impressed that the pay was more than fair and it proceeded to say how much less should be paid. The same thing occurred again in 1878, and a third time in 1907, Congress making its specific deduction from absolute, established pay.

On none of these three occasions could Congress have said to itself it was making a just diminution of the pay unless its mind had been fixed on absolute, established rates of pay as already in effect, superior to the power of any functionary to change them.

It is especially clear that in 1907, Congress meant to reduce the *established* compensation of some of

the routes—that and nothing else. In the debate on the bill of that year one of the spokesmen for the committee which had framed the bill took the pains to tell the House of the very large amounts which some of the routes were earning and receiving. (Congressional Record, Vol. 41, Part 4, pp. 3140, 3141.) It was clearly understood that it was necessary to pay those identical amounts for the like weights of mail—that the Postmaster General had no power to reduce them—until Congress itself should prescribe new rates.

More than once, since 1876, the Postmaster General himself has declared that he has not and ought not to have any discretion over the mail pay.

In 1878 the space basis of pay was under consideration and of that the Postmaster General in his report said:

> "The passage of the act, fixing certain rates per linear foot per mile, according to the speed of the trains, etc., without prescribing a gauge expressly limiting the amount of space to be required in each case, would leave the amount of space to be used and paid for to the discretion of the Postmaster General; this would leave to his judgment the rates to be paid for conveying the mails on 77,000 miles of railroad. Argument to show that this should not be done is unnecessary."

That Congress fully shared the views of the Postmaster General is shown by the legislation, in the Postoffice appropriation act approved March 3, 1879, which followed on his recommendation (20 Stat. L. Ch. 180, p. 358). There the Postmaster General was directed to ascertain as well as he could the cost and proper compensation for mail transportation, and this was added:

> "He shall, in his annual report to Congress, *make such recommendations* founded on the information obtained under this section, as shall, in his opinion, be just and equitable." (Italics ours.)

In his report for 1905 the Postmaster General told in some detail of the progress made in enlarging and improving the railway mail system, and he explained what advantages his Department could obtain, and what it could not obtain, through competition of the railroad companies. He said (p. 20):

> "The wide extension of the railway systems of the country and the very active competition between them have made the competition very much more active; hence it is that while the Department does not secure lower rates of compensation it secures better service and larger amounts of service by its fixed rule to give all through mails to the road which renders the best service and quickest delivery. As between the trunk lines this often means a full train of postal cars scheduled to meet the needs of the Department. * * *
>
> "Wherever competition is possible, the department, being unable to secure a lower rate of pay, uses the volume of mail to be dispatched to secure better service. Hence, where several competing lines between terminal points plead for an equitable division of through mail, the policy of this office is to deny the request and give the mail to that road which will permanently schedule and maintain the best train service."

Time and time again the Postmaster General had said, as in 1893 (*supra*), that the compensation was "not a matter within the control of the department."

The fact stands out in all of the pertinent legislation, commencing in 1873, that fixing of the pay for the railway mail service has been kept by Congress

rigidly in its own hands. Surely the compensation to be paid is among the "great outlines" of the railway mail service, not a "minute movement" of the service, such as to be confided, necessarily, to the discretion of the Postmaster General (*United States* v. *McDaniel*, 7 Pet. 1, 13).

See, again, *Chicago & Northwestern Ry. Co.* and *Chicago, Milwaukee & St. Paul Ry. Co.* cases, 104 U. S. 680–687.

The Question of Compensation was Expressly Reserved by the Parties.

What occurred in connection with the performance of the service here concerned was somewhat different from the ordinary formal protests under which railroad companies, or other persons dealing with the Government, have submitted to exactions of Government's officers.

Following several other letters from each side, claimant's General Counsel wrote to the Postmaster General:

> "I endeavored to make clear that our desire was to suggest an alternative to so radical a step by us as a refusal to carry these mails on these routes, namely, that we continue to carry the same without prejudice to our rights to the full compensation named in the contracts of September 15th and 16th, 1905. I read your reply as an insistence upon our accepting your views of the law on the subject and a refusal to assent to our accepting the warrant on account of carriage of mails on these routes without prejudice to such rights * * * I hope you can advise me if I have misinterpreted your letter. If not, however, and you still take this position, we will have no alternative but to decline to perform the service and you will please arrange for the carriage of the

> mails on these routes with other carriers at the earliest possible moment, advising us when the same is consummated. * * * Until such time, however, we apprehend that you fully understand that we reserve the right to the full compensation named in the contracts for the performance of this service."

In reply, on December 23d, the Postmaster General wrote:

> "The service may be continued by you, but it must be with the understanding that there is no agreement on the part of the Department to pay for the same at a higher rate than that fixed by the Readjustment Order issued in accordance with the act above referred to. There is no objection, however, to your reserving any legal right which you may have under contract existing prior to July 1, 1907, and resorting to legal procedure for the determination of the same if you choose to do so."
>
> (Record, pp. 22, 23.)

Here was a definite agreement of the parties—a supplement, it might be called, to the original contract. Here it was stipulated (1) that claimant did not recognize the legality of the orders reducing its compensation; (2) that the Postmaster General did not recognize claimant's rights to the old rates of pay; (3) that the mails would be carried by claimant and that the question of rates would thereafter be determined juridically.

If it be urged that claimant's remedy, upon the Postmaster General's announcement of reduced compensation, was to quit the service, a sufficient answer is that, like any other contractor against whom a breach has been committed by the other party, he had another

right, viz., to continue performance of the service and thereupon to demand the compensation that had been stipulated in the contract.

With regard to the criticisms of counsels' procedure which are sent by the Court of Claims to this court, in the form of an opinion, with the additional findings, due respect for this court, and for its judgment regarding their action, requires counsel to say this (and no more): The form of letter in question, which was sent out constantly by the Postmaster General to claimant, and to the railroad companies at large, was before the Court of Claims at the hearing of claimant's motion to amend the findings; it had been furnished to claimant's counsel by the Second Assistant Postmaster General, whose immediate representative was present at this hearing; observations were made, on the score of its pertinence, by Government counsel and by members of the court itself, and not a word was said regarding any lack of form; and it was received by the court with the other papers which were taken into chambers for consideration.

BENJ. CARTER,
Attorney for Claimant.

F. CARTER POPE,
Of Counsel.

No. 188.

In the Supreme Court of the United States.

OCTOBER TERM, 1916.

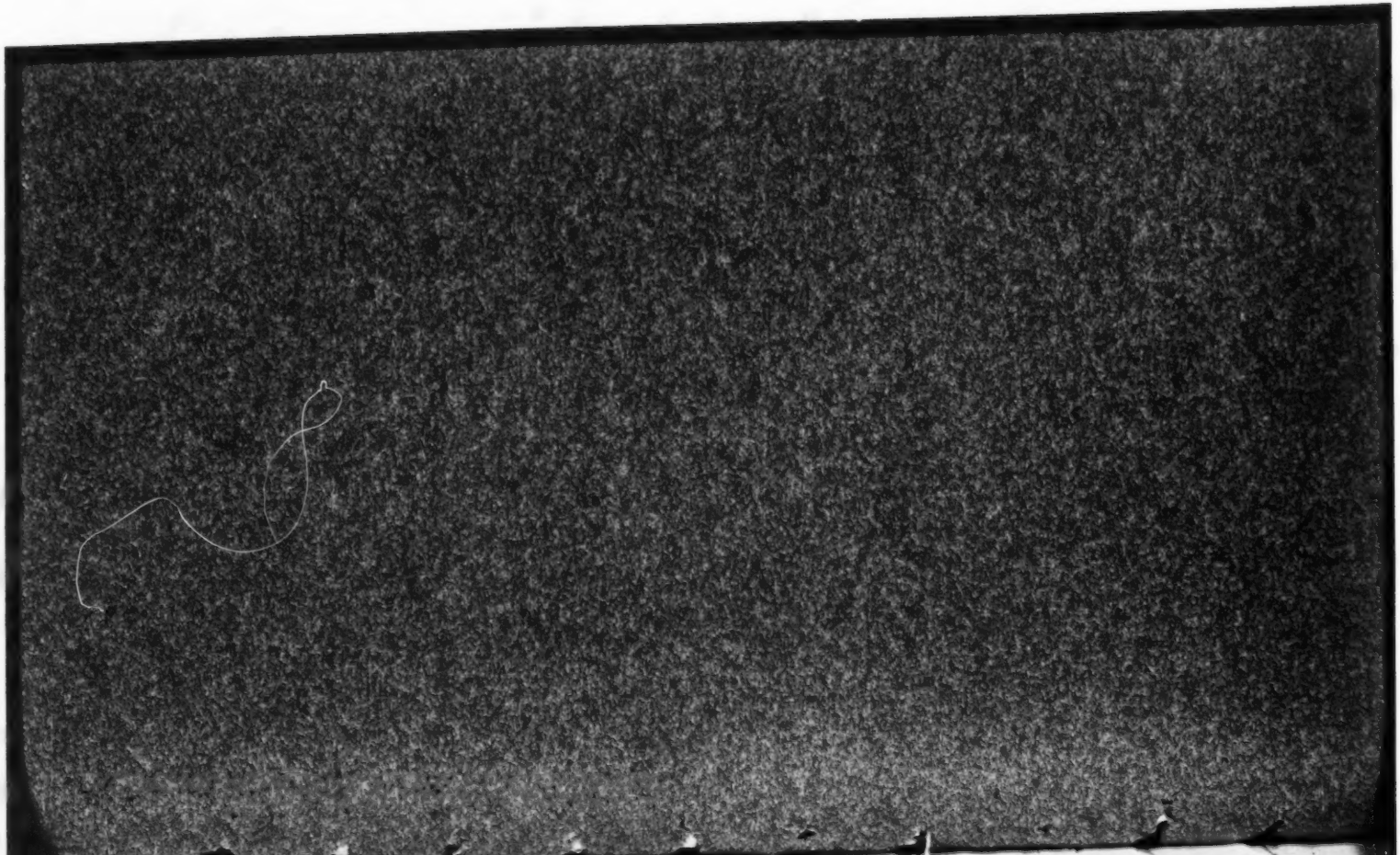
THE DELAWARE, LACKAWANNA AND WESTERN RAILROAD COMPANY, APPELLANT,

v.

THE UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.



In the Supreme Court of the United States.

OCTOBER TERM, 1918.

THE DELAWARE, LACKAWANNA AND WESTERN Railroad Company, appellant,
v.
THE UNITED STATES.
No. 158.

APPEAL FROM THE COURT OF CLAIMS.

BRIEF FOR THE UNITED STATES.

The appellant has appealed from a judgment of the Court of Claims in its favor for $698.39, and insists that the judgment should have been for $6,984.10.

STATEMENT OF THE CASE.

The appellant, a railroad company, sued to recover the amount stated, which it claims was unlawfully deducted from compensation to which it was entitled for carrying the mails.

The act of March 3, 1873 (17 Stat., 556, 558), provided, in substance, that thereafter compensation allowed railroads for carrying the mails should be based upon the average weight of mail matter carried, "to be ascertained, in every case, by the actual weighing of the mails for such a number of successive working days, not less than thirty, at such times,

after June thirtieth, eighteen hundred and seventy-three, and not less frequently than once in every four years."

In executing the provisions of this and subsequent acts the Postmaster General divided the country into four sections and has weighed the mails in one section each year. The result has been that the compensation on each route has been based for four years upon the weighing of the mails at the beginning of each term of four years. On the routes over which the appellant carried the mails there was a weighing for the quadrennial term beginning July 1, 1905, and expiring June 30, 1909, and by that weighing the average daily weight carried over the whole length of each of the routes was found to be in excess of 5,000 pounds per day. The amount of compensation to be paid, therefore, during the four years would be the amount allowed by law on the basis of this weighing. What actually occurred was this: On February 8, 1905, the Post Office Department, in accordance with the practice which had long prevailed, sent to the appellant what it called a distance circular for each of the routes. These circulars called for detailed information as to distances between stations, etc., and were required to be returned with this indorsement by the railroad company:

> In case the Post Office Department authorizes the transportation of mails over this line, or any part of it, the railroad company agrees to accept and perform service upon the condition prescribed by law and the regulations of the department. (Rec. pp. 8, 9.)

Upon the receipt of these circulars the Postmaster General made an order fixing the compensation per mile for each route, the order concluding with this statement:

> This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week. (Rec. p. 12.)

The following notice, signed by the Second Assistant Postmaster General, was sent to the appellant on September 15, 1905:

> SIR: The compensation for the transportation of mails, etc., on route No. 107108, between Hoboken and Buffalo, has been fixed from July 1, 1905, to June 30, 1909, under acts of March 3, 1873, July 12, 1876, and June 17, 1878, upon returns showing the amount and character of the service for 78 successive working days, commencing February 14, 1905, at the rate of $138,895.67 per annum, being $338.58 per mile for 410.23 miles, and pay is allowed for use of R. P. O. cars from July 1, 1905, to June 30, 1909, at the rate of $20,511.50 per annum, being $50 per mile for 410.23 miles for one line 60-foot cars between Hoboken and Buffalo.
>
> This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week. (Rec. p. 13.)

Similar notices covering each of the other routes in question were likewise sent.

The appellant was being paid at the rates thus fixed when, on March 2, 1907 (34 Stat., 1205, 1212), Congress passed an act as follows:

> The Postmaster General is hereby authorized and directed to readjust the compensation to be paid from and after the first day of July, nineteen hundred and seven, for the transportation of mail on railroad routes carrying their whole length an average weight of mail per day of upward of five thousand pounds by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows:
>
> On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds.
>
> * * * * *

On September 12, 1917, the Postmaster General, having made the readjustment directed, made orders changing the compensation to be paid appellant accordingly, and notified appellant of the change. The appellant protested, and there was considerable correspondence between it and the Postmaster General, in which the latter took the position that there was no existing contract which prevented Congress from reducing the compensation, for the reason that the mails were being carried under an arrangement by which the compensation previously fixed was subject to any future orders that might be made. The corre-

spondence concluded with a letter in which the Postmaster General said:

> The compensation has been restated in accordance with the provisions of the act of March 2, 1907, which is mandatory and leaves no discretion in the Postmaster General. The service may be continued by you, but it must be with the distinct understanding that there is no agreement on the part of the department to pay for the same at a higher rate than that fixed by the readjusting order issued in accordance with the act above referred to. There is no objection, however, to your reserving any legal right which you may have under the contract existing prior to July 1, 1907, and resorting to legal procedure for the determination of the same if you choose to do so. (Rec., p. 23.)

Thereafter the appellant continued to carry the mails and was paid according to the readjusting orders. The difference between the amounts so paid and what the compensation would have been under the order made in 1905 was $6,984.10, the amount sued for.

It will be seen that there was no formal contract executed. The appellant signified its willingness to perform the service "upon the conditions prescribed by law and the regulations of the department." Thereupon the Postmaster General figured the compensation based upon the weighing made for that purpose at the rates then prescribed by law, and notified the appellant that the rates were so fixed

for the period from July 1, 1905, to June 30, 1909, "subject to future orders."

QUESTION INVOLVED.

The change made was directed by an act of Congress. The only question, therefore, is whether the appellant had a definite contract which Congress could not change without its consent, or whether its only contract was one to carry the mails at the specified compensation, unless that compensation should thereafter be changed.

BRIEF.

The question presented is not new and can scarcely be said to be an open one. The claim made by appellant is foreclosed by decisions of this court rendered long ago. In 1876 Congress passed just such an act as is now involved, and ordered a reduction in the rates then being paid for carrying the mail (19 Stat., 78). That act came before this court in *Chicago, &c., Ry. Co.* v. *United States* (104 U. S., 680), and *Chicago, Milwaukee, &c., Ry. Co.* v. *United States* (104 U. S., 687). In both of these cases the railroad in question was what is known as a land-grant railroad, which had received grants of public lands upon the condition that the United States mail should be transported over its road under the direction of the Post Office Department at such prices as Congress might by law direct, provided that until such price is fixed by law, the Postmaster General should have the power to determine the same. Congress, however, had passed a law authorizing the

Postmaster General to enter into contracts for terms not exceeding four years for the carrying of the mail (Revised Statutes, 3942, 3946). And under this authority the Postmaster General had entered into contracts with the two railroads above mentioned for a period extending beyond the time that the act last quoted was passed. In these cases the court held that since the railroad companies had valid contracts for the periods named, it was manifestly not the intention of Congress to affect these contracts, and that the reduced rates did not go into effect until the expiration of the contract periods.

But the case of *Eastern Railroad Company* v. *United States* (129 U. S., 391) presented a different question. There the procedure had been practically the same as in this case. The distance circular had been sent out, and an order made by the Postmaster General fixing the compensation at the rates then provided by law, and notice thereof given to the railroad company, the notice containing the language that the compensation "has been fixed from July 1, 1877, to June 30, 1881 (unless otherwise ordered), under acts of March 3, 1873, and July 12, 1876."

The act passed in 1878 directed a similar reduction to that made in the present case. The court said:

> If the order made by the Postmaster General on that day, fixing certain rates, upon the basis of a reduction of ten per cent, for carrying the mails, from July 1, 1877, to June 30, 1881, and its acceptance by the railroad company, constituted an express contract, in respect to the compensation to be paid to it, still, as, by the

> terms of both the order and the notice, those rates were to govern, "unless otherwise ordered," there is no ground for the company to complain of the subsequent reduction of five per cent. This reservation of power in the Postmaster General opened the way for him to exercise the authority conferred, and to conform to the direction given, by the act of 1878. It can not be said that the reduction of five per cent was a violation of that contract; for, according to its terms, the parties agreed that the rates fixed at the latter date were subject to such future orders as the Postmaster General might make. We do not mean that the railroad company was bound to continue the carrying of the mails, if subsequent changes in the rates were unreasonable or did not meet with its assent. On the contrary, it was at liberty, when the five per cent reduction was made, to discontinue their transportation on its cars. (Pp. 395, 396.)

Proceeding, the opinion reaffirms the holding in *Chicago, &c. Ry. Co.* v. *United States, supra*, that the act of 1876 should not be construed as affecting the rights of a railroad company under a contract for transporting the mail which was in all respects valid under the laws in force when it was made, and said:

> That case differs from the present one in the important particular, that in the former the company bound itself to carry the mails during a certain period, and, consequently its acceptance from time to time, during that period, of less than it was entitled to demand did not prejudice its right to claim what was

> legally due under its contract; whereas, in the present case, the company could have declined to accede to the readjustments of rates when they were made. (P. 396.)

The present case is identical with the one last cited. The agreement of the appellant to perform the service "upon the condition prescribed by law and the regulations of the department," and the express stipulation that the adjustment of compensation then made was to be "subject to future orders," made the contract a most one under which the railroad agreed to carry the mails for a definite period at a compensation which was fixed only "unless otherwise ordered." The result was exactly as in the Eastern Railroad Company case, that the power was reserved by the Postmaster General to change this compensation, and it was changed pursuant to a valid law of Congress. Upon its being changed the appellant was not bound to carry the mails, if the reduced compensation was not satisfactory. It chose, however, to continue to carry them, and this in the face of notice from the Postmaster General that it must be distinctly understood that there was no agreement whatever to pay anything except the compensation prescribed by the act of Congress.

An effort is made to distinguish this case upon the ground that something may be found in the act of 1907 from which it may be inferred that there was to be a reweighing of mail before that act should go into effect. It is sufficient answer to say that there is not a word in the act referring to the weigh-

ing of mail, nor was there occasion for such reference. There was a general law which authorized the weighing of the mails at least once in every four years, and the practice of the department had for years been to make quadrennial weighings. All questions of compensation were settled with reference to these weighings. When, therefore, Congress simply directed a reduction in rates which were already determined by the weighing made in 1905, it obviously intended a reduction in these rates as they were then fixed.

It is respectfully submitted that there was no error in the judgment of the Court of Claims unless it be in its holding that the right to deduct the five per cent did not accrue on July 1, as directed by the act of Congress, but only on September 12, when the Postmaster General made his order. It was only upon this ground that the appellant was allowed any recovery at all. There was no other error in the judgment and it should be affirmed.

WILLIAM L. FRIERSON,
Assistant Attorney General.

DELAWARE, LACKAWANNA & WESTERN RAILROAD COMPANY *v.* UNITED STATES.

APPEAL FROM THE COURT OF CLAIMS.

No. 158. Argued March 26, 1919.—Decided April 14, 1919.

When the Court of Claims fails to state what the contract was between the claimant and the Government, this court cannot find it from facts which do not establish a contract as a matter of law. P. 387.

Where a railroad undertook transportation of mail during a certain period upon notice from the Post Office Department that the compensation had been fixed for the period at certain rates but "subject to future orders," and "unless otherwise ordered," *held*, in view of these qualifying words, that the contract did not guarantee the railroad against any change of the rates during that period. *Id.* *Eastern R. R. Co.* v. *United States*, 129 U. S. 391.

A reservation of the right to change the rates for mail transportation may be availed of by the United States through an act of Congress, even though the Postmaster General had no authority when the contract was made to change the rates himself. P. 388.

The Act of March 2, 1907, directing the Postmaster General to readjust the compensation for the transportation of mail on certain railroad routes carrying certain average weights of mail per day, did not require reweighing. *Id.*

51 Ct. Clms. 426, affirmed.

THE case is stated in the opinion.

Mr. F. Carter Pope and *Mr. Benjamin Carter* for appellant.

Mr. Assistant Attorney General Frierson for the United States.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition to recover additional pay for the carriage of the mails upon two routes from July 1, 1907, to July 1, 1909—the claimant alleging and the United States denying that it had contracts at fixed rates for four years from July 1, 1905. The Court of Claims, without stating in terms what the contracts were, set forth the transactions that fixed the relations of the parties, and rejected the claims. Under the statutes in force at the time a maximum price per mile was fixed with reference to the average weights carried by the railroad. This average was ascertained by weighing the mails for thirty days once in four years. The quadrennial weighing for the two routes concerned (from Hoboken to Buffalo and from Hoboken to Denville, New Jersey,) took place in the spring of 1905, upon a notice from the Post Office Department that it was in order to obtain the data for adjusting the pay from July 1, 1905, to June 30, 1909. At about the same time the Post Office Department in accordance with its practice sent to the Railroad a circular calling for a verified return of the distances on the routes and for an acceptance, as it was called, more properly an offer, in the following form:

"In case the Post Office Department authorizes the transportation of mails over this line, or any part of it, the railroad company agrees to accept and perform the service upon the conditions prescribed by law and the regulations of the Department."

Before July 1, 1905, these returns were executed, and on

September 15 the Post Office Department notified the Railroad that the compensation for transporting the mails on the Buffalo route "has been fixed from July 1, 1905, to June 30, 1909," upon returns, at certain sums. "This adjustment is subject to future orders and to fines and deductions, and is based on a service of not less than six round trips per week." The notice for the Denville route, sent September 16, 1905, was similar except that there was inserted after "has been fixed from July 1, 1905, to June 30, 1909," the words "unless otherwise ordered." There is nothing else bearing on the contracts except that the Post Office Regulations contemplate contracts for and not exceeding four years.

The rate thus fixed was paid for two years, but on September 12, 1907, in pursuance of an Act of Congress of March 2, 1907, c. 2513, 34 Stat. 1205, 1212, authorizing the Postmaster General to readjust the compensation to be paid after July 1 of that year, and to reduce the rate on certain average weights, he ordered the reduction complained of. The service was continued on an understanding that it was without prejudice to the rights of the Railroad in case it should be decided that it was entitled to the old rate for four years from July 1, 1905. The Court of Claims allowed the higher rate up to the time of the notice of the reduction but disallowed the rest, and the Railroad Company appealed.

It would be very difficult to say that the writings to which we have referred constituted a contract on the part of the Railroad to carry the mails for four years and on the part of the Government to accept the service for that time, even subject to the reservations that were expressed on its side. If in view of the circumstances and past practices a finding of such a contract was warranted no such finding has been made and this Court cannot make it. It is not a conclusion of law from the facts. But, however this may be, the notice to the Railroad that the

compensation has been fixed at certain rates, in one case "unless otherwise ordered" and in both "subject to future orders" excludes the possibility of holding that a change of rate could not be made so far as the written words were concerned. So it was decided in *Eastern R. R. Co.* v. *United States*, 129 U. S. 391, which answers the argument that the future orders referred to did not extend to a change of rates. In that case, to be sure, the railroad made no protest, but the decision was not placed upon that ground alone but also upon the effect of the words "unless otherwise ordered." It is said that the Postmaster General had no power to change the rates in 1905 when the papers were signed. But that would not obliterate the reservation and bind the United States to a different contract from that which the documents expressed if they expressed anything more than the rate at which the service was rendered while it was rendered. The United States was free to adopt the reservation in its favor and it did adopt it by the Act of 1907. As the case stands, the Railroad was free, as in the *Eastern Railroad Case*, to decline to carry at the new rates, but could not insist upon the old ones after notice that they had been revised.

It is argued that the Act of 1907 could not be put into effect without a reweighing. The act directs the Postmaster General to readjust the compensation to be paid from and after the first day of July, 1907, for the transportation of mail on certain routes "by making the following changes in the present rates per mile per annum for the transportation of mail on such routes, and hereafter the rates on such routes shall be as follows: On routes carrying their whole length an average weight of mail per day of more than five thousand pounds and less than forty-eight thousand pounds the rate shall be five per centum less than the present rates on all weight carried in excess of five thousand pounds"; with further reductions arrived at in like manner. The references to

average weights are not enough to require reweighing. They are an enumeration of the elements identifying and determining the present rates that are to be reduced. We see no reason to suppose that Congress intended to require a special and expensive investigation at the cost of the Government rather than to adopt the existing practice and to order the reduction without reference to the exact time when the last thirty days' weighing occurred or should occur.

Judgment affirmed.